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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. A 56

JOSEPH H. WESTON ..... *Petitioner*

vs. **79-497**

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

## BRIEF FOR PETITIONER

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### PETITIONER'S PRAYER

Joseph H. Weston, petitioner, hereby respectfully requests the Supreme Court of the United States to issue a Writ of Certiorari to review the opinion and judgment entered by the Supreme Court of Arkansas in this proceeding on February 12, 1979, and upon which a second hearing was denied April 30, 1979.

The Supreme Court of Arkansas is the court of last resort in that state and all means of appeal there have been exhausted.

### OPINION BELOW

The majority opinion of the February 12, 1979 decision

was written by Acting Chief Justice Stephen L. Matthews, a one-case appointee of then Governor David Pryor, and concurred in by Acting Associate Justice Richard H. Wootten, also a one-case appointee of that Governor.

The majority opinion, to which the names of ONLY Matthews and Wootten were affixed, affirmed AN UNRECORDED ORAL ORDER of November 19, 1977, in trial court in Independence County Circuit, by Circuit Judge Andrew G. Ponder, who was absolutely without jurisdiction in the matter by reason of having been replaced with the appointment of Special Judge Robert Dudley on a written order of Chief Justice Carlton Harris of the Arkansas Supreme Court.

A dissenting opinion was issued over the name of Associate Justice John I. Purtle, a regularly elected member of the Supreme Court, who recommended a reversal of the trial court decision because of error.

The vote — if any — of the court was en banc, and the names of four remaining regular members of the court who are presumed to have voted, were not recorded in the decision. Thus, on its face, the decision resulting from the two opinions showed that only THREE members had voted or expressed an opinion out of a total membership of seven members of the court.

Both the two-judge so-called majority decision, and the one-judge dissenting opinion are presented in the appendix of this petition and are to be found on Pages 106 through 116 of the Record of Docket Entries.



## TIME FOR FILING & EXTENSION

Time for filing ran for 90 days from April 30, 1979, the date of the denial of a second hearing. Denial on Page 123 of Record of Docket Entries, and also is found in the appendix to this petition.

On a timely request filed by petitioner, Mr. Justice Harry Blackmun issued an order on July 21, 1979 extending the time for filing to and including September 27, 1979. A copy of his order is found in the appendix to this petition.

## GROUNDS FOR JURISDICTION

The grounds upon which the jurisdiction of this court is invoked follow:

a. By ignoring plain facts and law, and by basing its decision primarily upon alleged technical deficiencies of petitioner as a pro se lawyer, the Supreme Court of Arkansas ruled contrary to the well-established Doctrine of the United States Supreme Court that protects the right of a person to represent himself in court.

b. By affirming the lower court decision of Judge Ponder and its subsidiary decisions of Judge Dudley, the Supreme Court countenanced and confirmed petitioner's deprivation of liberty (14 days in jail of a 6-month sentence; and property ($400.00 cash premium on a $4,000.00 bond), the wrecking of his business and cessation of his income, all without due process of law, in violation of the First and XIV Amendments to the Constitution of the United States, and Violation of the First and XIV Amendments to the U.S. Constitution, and contrary to the

freedom of press opinions expressed in the historic *New York Times* v. *Sullivan* and *Garrison* v. *Louisiana* of the United States Supreme Court. References to these opinions in this case are found in the appendix, in opinion of Judge Leroy Autry in the Report of *Joseph H. Weston* v. *State of Arkansas,* decision in the Arkansas Supreme Court entered October 20, 1975.

c. And by refusing to supervise or discipline Judges Ponder and Dudley for their unlawful actions, the Supreme Court denied the petitioner his right of equal protection under the law, also in violation of the XIV Amendment to the U.S. Constitution.

d. By approving Judge Dudley's having forced petitioner under duress of immediately being returned to jail, in a November 18, 1977 subsidiary court session to recant statements he had published in his newspaper previously and statements made OUTSIDE the court months previously, the Supreme Court denied petitioner his rights of free press and free speech, in violation of Sec. 6, Article II of the Constitution of Arkansas, and the First Amendment to the United States Constitution.

## QUESTION NO. 1

A. Did the Supreme Court err by ignoring the fact that petitioner had made a clear showing of a set of circumstances for which he was entitled to relief? (Jailed, bonded, denied rights of free press and free speech, destruction of his business by creating a situation of terror in which Weston's customers were afraid that they, too, would be jailed as Weston was?)

B. And by delivering a decision based primarily on



technical legal practice deficiencies alleged to have been committed by petitioner, who through urgent necessity, represented himself before that court?

C. It appears to petitioner that the Supreme Court's foregoing actions flagrantly flout the well-established Doctrine of the United States Supreme Court that a person should be protected in his right to represent himself. This Doctrine was clearly presented to the Arkansas Supreme Court early in the proceedings in petitioner's Reply Brief, page 29, a part of the Record now before this court, by quoting the following authority:

> Pro se complaints, according to the U.S. Supreme Court, are "held to less stringent standards than formal pleadings by lawyers.
>
> "And regardless of who represents plaintiff, a motion to dismiss is not granted unless it appears beyond a reasonable doubt that plaintiff can prove no set of circumstances which would entitle him to relief."
>
> *Gaines* v. *Kerner,* 1972 404 U.S. 519, 30L Ed. 2d. 652, 92 Ct. 594, 496 Reh Den 405 U.S. 948 30L Ed. 918, 92S Ct 963

## QUESTION NO. 2

Did the Supreme Court err by affirming the unrecorded oral order on November 19, 1977, of Judge Ponder, who on that day assumed jurisdiction over matters pertaining to Joseph H. Weston and the Independence County Grand Jury when he was absolutely without authority to do so?

Judge Ponder's written recusal (Page 40 of the Record of Docket Entries) file-marked December 12, 1977, re-affirms that he had orally recused himself on October 21, 1977, some 29 DAYS BEFORE he had falsely taken the bench and assumed jurisdiction over matters pertaining to Joseph H. Weston and the Grand Jury. A copy of this Order of Recusal is reproduced verbatim here:

> On this, the 5th day of December, 1977, the above-styled cause comes on for consideration, it being determined that Judge Andrew Ponder on the 21 day of October, 1977 recused himself from hearing any matter in which Joseph H. Weston is a party so long as Weston has any pending action in any court in which Judge Ponder is a defendant, this recusal is re-affirmed.
>
> WHEREFORE, it is ORDERED and ADJUDGED that on the undersigned's motion the undersigned again recuses himself herein and requests that another Judge be assigned to preside over the above-styled case; and the Clerk of this court is authorized to inform the Chief Justice of the Supreme Court and the litigants, Joseph H. Weston and Leroy Blankenship for the State of Arkansas of this order by transmitting a copy to each of them; and also in CIV 77-190. Signed by: ANDREW G. PONDER, Circuit Judge

Likewise, the order assigning Chancellor Robert Dudley to replace Judge Ponder, signed by Chief Justice Carlton Harris of the Supreme Court on October 25, 1977, was issued TWENTY-FIVE DAYS before the unlawful judgment on Weston's affairs was rendered by Judge Ponder on November 19, 1977. Chief Justice Harris' order appears over his signature on page 11 of



the Record of Docket Entries, and is presented verbatim herewith:

Order Concerning Assignment of Judges
No. 77-117

> Under authority vested in the Chief Justice of the Supreme Court of Arkansas Act 496 of 1965 as amended, Judge Robert Dudley of the Eighth Chancery Circuit is hereby assigned to the Third Judicial Circuit to hear ALL MATTERS PERTAINING TO JOSEPH H. WESTON'S APPEARANCE BEFORE THE INDEPENDENCE COUNTY GRANT JURY
>
> This assignment includes all ancillary proceedings which may arise in connection with said cause and proceedings subsequent thereto. The hearing of said cause and proceedings subsequent thereto shall be held at such time or times and shall be directed and ordered by Judge Robert Dudley.
>
> The assignment of Judge Dudley to the Third Judicial Circuit entails only additional duties and jurisdiction in the Eighth Chancery circuit shall remain in Judge Robert Dudley to the same extent as though this assignment had not been made.
>
> SPECIAL PROVISIONS: None.
>
> This order made and entered on this 25th day of October, 1977. Signed by Carlton Harris, Chief Justice

It was not until December 13, 1977, in a new order, that

Chief Justice Harris replaced Judge Dudley by appointing Circuit Judge H.A. Taylor of the Eleventh Judicial Circuit to assume jurisdiction over matters pertaining to Joseph H. Weston and the Independence County Grand Jury in subsequent proceedings that are not shown in this cause. Judge Taylor still holds that Jurisdiction, the Chief Justice's order for which appears in the appendix to this petition.

Special Judge Robert Dudley, who properly held jurisdiction on order of Chief Justice Carlton Harris, WAS NOT PRESENT at court sessions held on November 19, 1977 in matters pertaining to Joseph H. Weston.

Judge Andrew Ponder took the bench in violation of the Chief Justice's order of assignment and:

1. Made a misleading and perjurious statement to the press that he was resuming jurisdiction in the Weston case because a lawsuit by Weston against Ponder in Lawrence Circuit Court had been dismissed. (That suit, was in fact, on timely and recorded appeal to the Arkansas Supreme Court, and Ponder had been properly served with notice of that fact.)

2. Judge Ponder overruled an objection by the Honorable Steve Engstrom, attorney for Charles Patterson, and on a plea of Prosecuting Attorney Blankenship, that Patterson's testimony to the Grand Jury was necessary in the Weston proceedings, ordered Patterson to so testify.

3. Later that day, the Grand Jury returned four indictments of perjury against Weston and presented them in open court to Ponder, again sitting on the bench.



4. Ponder, without authority to do so, accepted the indictments and orally ordered the arrest of Weston, setting Weston's bond at $4,000.00.

5. Weston was arrested on the afternoon of November 19, 1977 and held in jail overnight pending the posting of bond.

6. The foregoing facts were, and are, a matter of public knowledge in Batesville, Arkansas, a city of 10,000, and in Weston's nearby hometown, a city of 1,000 and throughout the area of the trial, by reason of a full newspaper account published under the by-line of Roy Ockert, Jr., managing editor of the Batesville Guard, and a thoroughly esteemed and reputable journalist, being at that time the president of the Associated Press Managing Editors' Association for Arkansas. A copy of his eye-witness and publicly signed account appears on Page 82 of the Record of Docket Entries.

7. The True Bill containing the above-noted four counts of perjury is to be found on Page 46 of the Record of Docket Entries before this court.

Weston had been previously sentenced to six months in jail and actually served 14 days in jail in this cause and further notice is taken of this fact at another place in this petition.

THEREFORE, petitioner has made a clear showing that Judge Ponder acted absolutely without jurisdiction in the Weston case on November 19, 1977, and has never had jurisdiction therein since his recusal on October 21, 1977.

The Arkansas Supreme Court had previously ruled, in the case of *Bolden* v. *State,* on a similar situation, in which the opi-

nion had been written by Associate Justice George Howard Jr.

In the case of *Truman Bolden and Dozier Bolden* v. *State of Arkansas,* CR 77-89 561 S.W. 2d 281, January 30, 1978, Justice Howard's decision follows:

> "We are persuaded that appellants' contentions two and four have merit, and, accordingly, the verdicts and judgment are reversed.
>
> "The record reflects that Circuit Judge Hargroves, in response to appellees' motion, voluntarily disqualified himself from participating in this case at the inception of the pretrial conference held on October 22, 1976. Having announced from the bench and for the record his disqualification, Judge Hargroves lost jurisdiction of the case and was without authority to act further in any judicial capacity except to make the proper transfer of the case or take the appropriate steps for the selection of another judge. However, this reflects that the transfer of the case was not made until after Judge Hargroves had selected a new jury commission, instructed the new jury commission on its duties and responsibilities and ruled on the validity of appellants' motion challenging the charges pending against them on the grounds that no preliminary hearing had been afforded appellants.
>
> The judge's voluntary disqualification may have, in the judgment of appellants and their counsel, amounted to an admission of his bias and prejudice, and for the judge to proceed with issues, raised by defendants, involving the exercise of discretion, may have further supported their doubt or suspicion of the impartiality of his rulings.



> Indeed, the proper administration of the law requires not only that judges refrain from actual bias but also that they refrain from all appearances of unfairness.
>
> "Judge Hargroves, however, is to be commended for his voluntary action, whether he actually sheltered any bias or not, in order to dispel any thought or suspicion that the litigants might not be receiving a fair trial.
>
> "In 48 C.J.S., Sec. 97, at page 1105, it is provided:
>
> "The disqualification of a judge generally deprives him of authority to perform any judicial act or to perform any act calling for an exercise of judicial discretion in connection with the pending cause, except to select another judge or to make a transfer of the case in accordance with the law.'"

The complete report of the *Bolden* v. *State of Arkansas* case, including Justice Howard's quotations of Law and Authorities, appears in the appendix to this case.

## QUESTION NO. 3

## PETITIONER QUESTIONS LEGALITY AND PROPRIETY OF DECISION AS A DOCUMENT

Both the "Majority" and the Dissenting opinions are found in the appendix of this petition. They also are found on pages 106 through 116 of the Record of Docket Entries, which in its entirety has been certified to be made up of true and correct copies of the original documents on file in the office of the Clerk of the Supreme Court of Arkansas.

Thus, being certified as true copies of the two documents as actually filed, this collective decision DOES NOT MEET THE REQUIREMENTS OF THE CONSTITUTION OF THE STATE OF ARKANSAS.

Sec. 49 of Article VII of the Arkansas Constitution reads:

> All writs and other judicial process shall run in the name of the state of Arkansas, bear test, and be signed by the clerks of the respective courts from which they issue. Indictments shall conclude: "Against the peace and dignity of the state of Arkansas."

Neither document bears the statement that it "runs in the name of the State of Arkansas", nor does it bear the seal of the Arkansas Supreme Court. And this, alone, disqualifies both documents from being official instruments.

Sec. 19, Article V (Legislative) of the Constitution of Arkansas is the Legislative department's companion article to Sec. 49 of the Judiciary department, and reads:

> Sec. 19, Article V: "The style of the laws of the General Assembly shall be, 'Be it enacted by the General Assembly of the State of Arkansas'"

It is common knowledge throughout the state that the General Assembly, through oversight (or knavery) has from time to time left the enacting clause out of legislation, and when discovery of this was made, the legislation was immediately nullified. This has happened to one or more bills in just about every session of the legislature in the entire history of the state!



The Arkansas Constitution even more stringently applies a similar authority-giving section to the Executive department of the state:

> Sec. 10, Article VI — "All grants and commissions shall be issued in the name of, and by the authority of the State of Arkansas, sealed by the Great Seal of the State, signed by the Governor, and attested by the Secretary of State."

THUS, THE FRAMERS OF THE ARKANSAS STATE CONSTITUTION OF 1874 MADE IT CRYSTAL CLEAR THAT THEY EXPECTED EVERY DOCUMENT ISSUED IN THE NAME OF AND BY THE AUTHORITY OF THE STATE OF ARKANSAS TO BEAR AN OFFICIAL STATEMENT OF THAT FACT.

The other two "equal departments" of the state government scrupulously follow these constitutional provisions, and it is surprising that the Supreme Court, which should keep itself in a position to set an example for the rest of the state to follow in legal affairs, should be so errant in the production of an official document.

Petitioner Weston called attention of the Supreme Court to this constitutional aberration directly in Section II of his PETITION FOR SECOND HEARING AND RE-ORGANIZATION OF THE COURT.

This petition is to be found on Pages 118 and 119 of the Clerk's Certified Record of Docket Entries.

The Arkansas Supreme Court denied petition for a

SECOND HEARING AND RE-ORGANIZATION OF THE COURT, and totally ignored petitioner's allegations of unconstitutionality. Page 123 of the Record of Docket Entries.

Please note that the court order denying Weston's petition for a Second Hearing WAS signed by the Clerk of the Court, and DID bear test, and DID bear the seal of the Arkansas Supreme Court.

And this gives rise to Weston's claim herewith, that the manner in which the Decision of the Supreme Court of February 12, 1979 in the cause of *Weston* v. *Arkansas* was issued, was exceptional, and has deprived Weston of equal protection of the laws of Arkansas.

Numerous other emissions of the State Supreme Court found throughout the Record of Docket Entries also bear test, seal, and signature of the Clerk.

THEREFORE, inasmuch as the Test requirement was expected of petitioner, and inasmuch as he adhered to it in his own submissions to the State Supreme Court and its subordinate courts, petitioner Weston claims justly that he has suffered great inconvenience, labor and expense in a long fight since February 12, 1979, to defend himself against an erroneous, illegal, and unconstitutional document emitted by the Supreme Court of Arkansas in violation of the Constitution of Arkansas, and contrary to the XIV Amendment to the Constitution of the United States.

Section 3, Article II, Constitution of Arkansas, reads:

"The equality of all persons before the law is recognized,



and shall ever remain inviolate; nor shall any citizen be deprived of any right, privilege or immunity, nor exempted from any burden or duty on account of race, color or previous condition."

## QUESTION NO. 4

## PETITIONER CHALLENGES QUALIFICATIONS OF MATTHEWS AND WOOTTON

No entries whatever were made in the Record to acknowledge the appointment and qualification of Acting Chief Justice Stephen Matthews and Acting Associate Justice Richard H. Wootton.

The first and ONLY appearance of the names of Matthews and Wootton in the Record is constituted by the appending of their names to the February 12 Majority Opinion and judgment.

Petitioner cannot accept as valid any opinion or decision made by persons who were not properly qualified or not properly entered as such in the written Record of the case.

This error is certainly a direct violation of the Arkansas Freedom of Information Act, to be found in the appendix to this petition.

This failure to properly enter their identity and qualifications in the Record violates Sec. 12, Article VI of the Constitution of Arkansas which reads:

"All grants and commissions shall be issued in the name

and by the authority of the State of Arkansas, sealed by the Great Seal of the State, signed by the Governor and attested by the Secretary of State."

Also being apropos is Sec. 49 of Article VII of the Constitution of Arkansas which reads:

"All writs and other judicial process shall run in the name of the State of Arkansas, bear test, and be signed by the respective clerks of the courts from which they issue . . . "

Inasmuch as Matthews and Wootton are reputed to have Supreme Court authority ONLY in the matter of *Joseph H. Weston* v. *Arkansas* CR 77-238 in Arkansas, (A56 in the U.S. Supreme Court), the failure to record their appointment singles Weston out for exceptional treatment and possible injury that are not equally administered to any or all other litigants before the Supreme Court of Arkansas, this constitutes a violation of Weston's equal rights of citizenship under the XIV Amendment to the Constitution of the United States.

This lack of Record entries if intentional has the secret character of ancient and horrible Star Chamber procedures. If unintentional, it signifies a callous disregard for proprieties, incidental to service on the bench of the highest court of law in the state of Arkansas.

## ORDER NO. 5

Is it an error that Acting Chief Justice Matthews, in concurrence with Acting Justice Wootton, AFFIRMED a lower court order that he had, in the same opinion, previously declared did not exist?



In his opinion, Acting Chief Justice Matthews states:

"Our refusal to afford appellant relief at this stage of the proceedings is based on all or any of the three reasons set out above, i.e., no appealable order is before us, the record does not support appellant's position, and there has been no compliance with Rule 9."

Thus Matthews has ruled that the unlawful actions of Judge Ponder on November 19, 1977 which Weston was, and is appealing, cannot be appealed because there is no written order signed by the only person who could sign that order — Judge Ponder.

In his decision, at the end of the opinion Matthews has used a classic one-word judgment: Affirmed.

WHAT has he affirmed? AN ORDER THAT HE HAS DECLARED DOES NOT EXIST:

The declaration by Matthews that an appealable order does not lie before the court is essentially an argument on jurisdiction, and at the stage of the proceedings at which Matthews wrote his opinion, the problem was no longer arguable.

This cause was first filed with the Supreme Court of Arkansas on December 27, 1977 by lodging the Record from the lower court and by filing a petition for a writ of mandamus to compel the lower court to produce a proper order covering the activities of Judge Ponder on November 19, 1977 (Pages 43 and 44 of Record of Docket Entries).

On January 16, 1978, Page 60 Record of Docket Entries, the Supreme Court of Arkansas perfected jurisdiction in the case by acting upon the petitions for mandamus. This action was followed by accepting and acting upon a long line of petitions and pleadings including a printed brief and reply brief, as well as Oral Argument, throughout a period of 15 months of viable action prior to the day the Acting Chief Justice produced his opinion and decision.

The only time when the Supreme Court of Arkansas could have lawfully refused jurisdiction was when Weston's first petition, or at most, first three or four pleadings came before it. At that time that court could have exercised a discretionary power of refusing to hear the petitions.

After 15 months of activity in the court, the Matthews-Wootton decision, which was compounded by denial of a second hearing BASED UPON A DECLARATION OF LACK OF JURISDICTION, has stripped Weston of the fruits of 15 months of work to defend himself in the state supreme court, plus three months in the lower court.

SUBSIDIARY QUESTION:

Is it a reversible error that the Acting Chief Justice based his decision upon the fact that no order from Judge Ponder existed concerning the November 19, 1977 court decision, when the Supreme Court, upon petition of appellant (Pages 50 through 60) had refused to issue a writ of mandamus to compel the lower court to submit such an order?

QUESTION NO. 6



Did the Supreme Court of Arkansas possess the requisite power to compel the lower court to provide a written order to accurately reflect the activities of Judge Ponder in his court sessions of November 19, 1977?

Although there is almost a complete lack of statutory regulation of the activities of the Supreme Court of Arkansas, it appears to the petitioner that a power — and a responsibility — for that court to supervise and discipline ALL the lower courts of the state is conferred and mandated in Sec. 4, Article II of the Constitution of the State of Arkansas, which follows:

> "The Supreme Court, excepting cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supercedas, certiori, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs."

The Supreme Court of Arkansas has accepted very little resonsibility for control over, supervision, or discipline of the lower courts in the entire lifetime of the State since its original organization as a member State of the United States of America.

It has taken no affirmative steps to promote the honesty and integrity of the lower courts, and itself has shirked public

responsibility for the actions and official opinions of its own Justices by hiding behind a secretive en banc device that has persisted without change or constitutional or statutory correlation, in direct and unmitigated descent from Star Chamber proceedings of the courts of Medieval England.

On pages 15 and 16 of Supplementary Record C, which is before this Court, Justice Conley Byrd of the Arkansas Supreme Court, on March 9, 1979 submitted a Motion for Summary Judgment in Case No. 79-1423, then pending against him in Pulaski Circuit Court in Little Rock.

In paragraph 3 in that Motion, Judge Conley Byrd writes (over his own signature as a pro se pleading) as follows:

> "3. That from the beginning of Statehood in 1836, the Public has understood that each of the Sitting Justices of the Supreme Court joined in the opinions unless the contrary was shown on the opinions.
>
> "4. That the only record kept of the votes of the individual Justices of the Supreme Court are those shown on the opinions handed down by the Court as above described."

Justice Byrd's present term on the Arkansas Supreme Court expires at the end of 1980, and he has indicated by a campaigning attitude that he probably will be a candidate for the Democratic party's re-nomination (tantamount to election) in the 1980 elections. In vigorously supporting the Star Chamber-like method of NOT recording how Justices of the Supreme Court vote, he has a strong personal interest to suppress public knowledge of how he voted on several politically-sensitive issues.



His motion here noted, however, is prima facie admission that the Supreme Court of Arkansas is deliberately and willfully operating in defiance of almost all of the sections of the Arkansas Freedom of Information Act found fully reproduced in the appendix to this petition.

The ancient unwillingness of the State Supreme Court to superintend and correct the errantry of the state's circuit courts (in order to keep the solidly Democratic dictatorship intact), combined with a deliberate, time-honored Common Law and Star Chamber method of hiding its own official actions from public scrutiny, HAS MAINTAINED INTACT IN ARKANSAS A MEDIEVAL FORM OF GOVERNMENT THAT IS UTTERLY FOREIGN TO, AND ANTAGONISTIC TO THE REPUBLICAN FORM OF GOVERNMENT WHICH THE UNITED STATES MUST GUARANTEE TO EVERY STATE OF THE UNION IN ACCORD WITH Sec. 4, Article IV of the Constitution of the United States:

> "The United States shall guarantee to every State in this Union a Republican Form of Government and shall protect them against invasion . . ."

Due to lack of supervision and discipline, delibately neglected by the state Supreme Court, the lower courts have for 143 years been free to erect tyrannous petty kingdoms of their own — answerable to no superior authority whatever, and many of them have done so.

This is especially true when men of dictatorial habits and inclinations like Judge Andrew G. Ponder come into power at the circuit court level, and when they team with, and are

abetted by persons of similar character like Leroy Blankenship, who at the time of the infamous November 19, 1977 decision of Judge Ponder was the prosecuting attorney for Ponder's entire 3rd Judicial District. Blankenship is now circuit judge of a judicial district adjacent to the presently reorganized district of which Ponder is circuit judge.

When the Sharp Citizen began its political reform crusade in Arkansas in January, 1972, the entire state was constricted into a dictatorial government, enforced by the circuit court judges, that made life dangerous for anyone who voted against the triumvirate of Wilbur Mills, J. William Fulbright, and John L. McClellan.

The circuit courts enforced this power by driving all dissidents or possible political opponents from the state. Thus, the poor, the intellectuals and the blacks were forcefully exported to "that foreign nation, the United States" and Arkansas' population remained static for a hundred years.

When the Sharp Citizen began publication, at a risk of Editor Weston's life incurred anew with each succeeding weekly publication, the leaders of the state were shocked, but many of the oppressed rallied to the Editor's support.

Changes, at first, came slowly.

However, the tempo of governmental reorganization rapidly stepped up. The Legislative and the Executive departments, as well as the people themselves, with constitutional amendments, moved to abolish the medieval fee system of local and county government, and the often ignorant local justices of the peace.



Indeed, Arkansas has made remarkable progress in bringing its government out of Medievalism since Editor Weston's Sharp Citizen began its historic work in 1972.

BUT THE CIRCUIT COURTS, OR AT LEAST MANY OF THEM, REMAIN DEEP IN THE HEART OF MEDIEVAL ENGLAND — and have not kept pace with the encouraging reforms effected by both the Legislative and Executive departments of the state government, and directly by the vote of the people.

Due to the Equal Power Doctrine of our state and national governments, the only way that effective court reform can be obtained is through the courts themselves.

And to this end, and also for the purpose of keeping Editor Weston out of Cummins State Prison for the rest of his life on a totally false conviction from Independence County Circuit Court, petitioner earnestly invokes corrective action from the highest court in the nation, having exhausted all possibility of relief from courts of Arkansas during his lifetime.

Petitioner is now aged 68, seriously ailing from incurable and greatly advanced diabetes, and from jailings, beatings, and an over-strenuous effort to protect his family that includes five children under the age of 10, his honor, and even his life itself.

## QUESTION NO. 7

Was it in error that six Justices refused to disqualify themselves from hearing appellant's Petition for a Second Hearing and Re-Organization of the Court after Appellant had twice challenged their jurisdiction?

In Appellant's Petition for Second Hearing and Re-Organization of the Court, filed with the Arkansas Supreme Court on March 8, 1979 (page 117, 118, and 119 Record of Docket Entries) Appellant asked six Justices to disqualify themselves by reason of their being defendants in a substantial lawsuit against them by appellant in Pulaski County Circuit Court.

Names of the Justices were: Acting Chief Justice Stephen A. Matthews, Acting Justice Richard H. Wootton and Justices George Rose Smith, Frank Holt, Darrell Hickman, and Conley Byrd.

On March 23, Judge Lowber Hendricks dismissed the Case No. 79-1423, (opinion found on pages 59, 60, 61, 62 of Supplementary Record C).

On April 11, 1969, Appellant filed an APPEAL with Pulaski Circuit Court (pages 63, 64, 65 of Supplementary Record C), serving copies on Kay L. Matthews, as attorney for Conley Byrd, and on Russell Meeks III, assistant attorney general as respondent for Matthews, George Rose Smith, Hickman, Holt, and Wootton.

On March 26, 1979, Appellant AGAIN asked the defendant Justices to withdraw in an ADDITION TO PETITION FOR SECOND HEARING AND REORGANIZATION OF THE COURT (found on page 121 of Record of Docket Entries).

On April 30, 1979, the Arkansas Supreme Court handed down an order reading "Rehearing Denied". (Page 124 of Record of Docket Entries.) Appellant's petition for reorganization of the court was totally ignored, and NONE of the defendant Justices withdrew.



The matter of the Justices' possible recusal in this situation does not allow for discretion.

It is a matter of directed action, as mandated by Sec. 20, Article VII, Constitution of the State of Arkansas, which reads as follows:

> "No judge or justice shall preside in the trial of any cause in the event of which he may be interested, or where either of the parties shall be connected with him by consanguinity or affinity, within such a degree as may be prescribed by law; or in which he may have been of council or have presided in any inferior court."

## QUESTION NO. 8

Did the Arkansas Supreme Court err in affirming an order that had accepted four indictments of perjury against Weston which had been issued by a Grand Jury wholly and illegally under the control of Prosecuting Attorney Leroy Blankenship?

From Pages 3 and 4 of Weston's Abstract and Brief for appellant duly filed with the Clerk of the Supreme Court of Arkansas, the following is quoted:

> "I was called before the Independence County Grand Jury on October 18, 1977.
>
> "Blankenship, in masterly management of the Grand Jury, questioned me closely about my sources of information

about the Seaton sex article. Then he called Seaton to testify, who, of course, stated that he had never had sex relations with any of the three women I had named, nor with any other woman.

"Blankehship's handling of the Grand Jury was superb. He never left them to wander in a moment. He presented the evidence, interrogated me and other witnesses, guided the Grand Jury discussion into constructive channels, assisted them in their deliberations, and personally and very graciously assisted them in voting and personally saw that their vote was properly recorded. So devoted was Blankenship to serving the Grand Jury that my "spies" were able to report that he never once left them throughout their deliberations — not even to go to the bathroom — over the entire month of their frequent meetings."

The above-quoted Abstract and Brief for Appellant is found in the Supplemental Record "B" on file with this court.

In Paragraph 6 of its Response To Motion to Quash Grand Jury, filed November 4, 1977, and found on Page 17 of the Record of Docket Entries now before this court, the Grand Jury confirms that Prosecutor Blankenship was overly solicitious in his care of the Grand Jury BUT DOES NOT DENY THAT BLANKENSHIP REMAINED WITH THE GRAND JURY DURING ITS DELIBERATIONS, nor at any time denied that Prosecutor Blankenship was present in the Grand Jury room during that jury's deliberations, although he had ample time to do so, either in his Reply Brief, in Oral Argument, or in a separate Motion or Petition to the Supreme Court.

Justice Purtle in his Dissenting Opinion, takes note of this



situation, and rules as follows upon it:

"The minutes of the Grand Jury have apparently never been furnished to appellant. If the prosecutor was in fact directing the whole proceedings, and was present during the deliberation of the Grand Jury, it is a reversible error. Some parts of the record were found after this court entered a mandate to the lower court. The record is still technically incomplete."

Justice Purtle's above shown quotation appears on Page 115 of the Record of Docket Entries, and in the appendix to this petition.

## QUESTION NO. 9

Did the Supreme Court of Arkansas err by failing to present for the Record a clear-cut unequivocal line of judicial responsibility of its own members in considering this case?

(a) Regular Chief Justice Carlton Harris did NOT enter an order Recusing himself.

(b) Court orders dated January 16, 1978 and on page 60 of the Record, and dated March 27, 1978 on page 98 of the Record do NOT list the name of Chief Harris as non-participating, and under that court's policies in this matter, Chief Harris COULD have participated. And, on the other hand, maybe he did NOT participate. Would the honorable members of this court care to choose "heads" or "tails" while we flip the coin?

(c) ON FOUR orders of the State Supreme Court in the Record, Chief Harris is recorded as NOT participating in this

case.

(d) Acting Chief Justice Matthews could not have been lawfully and constitutionally appointed to serve in this case unless Chief Justice Carlton Harris had recused himself and communicated a request to the Governor for the commissioning of a replacement.

Yet, the Record does NOT reflect that the regular Chief Justice performed either of these acts:

(e) The participation of the regularly-elected Chief Justice in this case in an on-again, off-again basis gives rise to a legitimate suspicion that he could have wandered in and out of jurisdiction in a capricious manner as expediency of the moment might have dictated.

(f) Simply by listing a non-participating clause in four orders of the many orders and actions taken by the Arkansas Supreme Court during the 15 months of pendency of this case there, does not serve to remove the possibility or suspicion that Chief Justice Harris might have actually managed ALL stages of the trail.

(g) The lack of entry of orders showing Acting Chief Justice Matthews as having been properly commissioned and qualified, and absence of orders clearly denoting that Chief Justice Carlton Harris had recused himself to the Governor and asked for replacement, also bring up the very interesting possibility that the Arkansas Supreme Court in this case possessed a de facto membership of TWO active Chief Justices and at least eight total members of the court, whereas, the Constitution of Arkansas specifies that the court shall have ONE Chief Justice and



SEVEN total members.

(h) This befuddling arrangement clearly violates Sec. 12-2802, Sec. 12-2803 (b) of the Arkansas Freedom of Information Act, a copy of which appears in the appendix of this petition.

2.(a) Associate Justice Fogleman did NOT enter into the Record an Order of Recusal, nor did he make an entry into the Record that he had withdrawn and asked the Governor for a replacement.

(b) This places a pall over the tenure of Associate Justice Richard H. Wootton on the bench, in addition to the deficiencies of alleged accession to office that are noted elsewhere in this petition.

(c) Justice Fogleman consistently listed himself as "not participating" in all orders of the court in this case that appellant has seen.

HOWEVER, SIMPLE NON-PARTICIPATION ON AN ORDER-TO-ORDER BASIS DOES NOT CONSTITUTE A RECUSAL.

Such action does NOT specify a date on which responsibility ceased, and leaves open the ever-present possibility of reentry — without proper record — and unknown to appellant, at any time Justice Fogleman might have desired to resume activity as a matter of his own convenience and expedience.

(d) Justice Fogleman's failure to enter proper written evidence into the Record that he might have communicated his withdrawal to the Governor and might have asked for the ap-

pointment of a replacement also casts a pall over the tenure of Acting Associate Justice Richard Wootton.

(e) Justice Fogleman's action, or inaction, as the case may be, also violates Sec. 12-2802 and Sec. 12-2803 (b) of the Arkansas Freedom of Information Act.

3. At no time throughout its consideration of Case No. CR 77-238, has the Supreme Court of Arkansas made an honest, accurate, legal and constitutional showing of the Justices actually participating in the action, nor a division of their duties, nor a showing of their responsibilities.

(a) An order denying a writ of mandamus, on page 60 of the Record, dated January 16, 1978, fails to show the name of ANY Justice who authorized or issued the order, in utter disregard of responsibility to the people of Arkansas and in flagrant violation of Sec. 12-2802 and 12-2803 (b) of the Arkansas Public Information Act.

(b) The same condition applies to orders found in the Record on Pages 97, 18, 105, 120, 123, and 125. All of them violate Sec. 12-2802, Sec. 12-2803 (b) and other parts of The Arkansas Freedom of Information Act.

4.(a) From the beginning of consideration of Case CR 77-238 in the Supreme Court of Arkansas on December 27, 1977 until the denial of a Second Hearing on April 30, 1979, a total of TEN Justices participated, in one way or another, in the deliberations.

Their names follow: Chief Justice Carlton Harris, Acting Chief Justice Stephen Matthews, Justices John Fogleman,



George Rose Smith, Frank Holt, Conley Byrd, Darrell Hickman, George Howard Jr., John I. Purtle, and Acting Justice Richard H. Wootton.

(b) The Record reflects that EIGHT Justices and TWO Chief Justices were, or could have been, in participation all at the same time, and especially at the time of the final decision on February 12, 1979 and the denial of Second Hearing on April 30, 1979.

Although the names of Harris and Fogleman appear on these two documents, there is no assurance whatever that they did NOT participate in conferences, discussions, or possibly even votes leading to the opinion and decision written by Matthews, because the Record reflects that Harris and Fogleman had never entered a recusal to lawfully fix the extent or limitation of their duties and authority.

(c) Nothing in the Record, nor in the circuitous ramifications of the actions of the Justices reflects a clear cut definition of the panel that considered this case.

At the Oral Argument, May 22, 1978, FOUR JUSTICES, AND ONLY FOUR JUSTICES SAT ON THE BENCH: CONLEY BYRD, FRANK HOLT, DARRELL HICKMAN AND GEORGE HOWARD JR.

Whereas, although the final decision was identified with the participation of only THREE Justices; Matthews and Wootton for affirming, and Purtle in dissent, the court entered an en banc report of the case in the February 12, 1979 edition of the Arkansas Supreme Court Advance Reports. This Report is alleged to have carried the presumption by that court, that

seven fully qualified members of the Supreme Court participated in the vote (which was held in a secret meeting of the court from which appellant, the public and the press were excluded).

The Record does not reflect that SEVEN Justices actually participated in the vote.

Note, at the Oral Argument only FOUR Justices sat on the bench in open court, while petitioner is expected to "understand" that SEVEN Justices voted in the secret meeting prior to February 12, 1979 announcement of the decision.

Petitioner cannot accept this presumption, and charges that the manner in which the decision was arrived at and handed down is a clear violation of the Arkansas Freedom of Information Act.

That court has failed — even refused — to enter proper records and make them available to appellant under provisions of 12-2803 (a) and (b) of that law.

That court met in a secret meeting to consider appellant's Case No. CR 77-238 in violation of Sec. 12-2803 and 12-2805, of the Arkansas Freedom of Information Act. It will be noted in the last paragraph of Sec. 12-2803, that the ONLY meetings of courts exempt from this law are GRAND JURIES. The Supreme Court of the State of Arkansas is NOT exempted from jurisdiction of the Act.

The proceedings of that secret meeting included a vote by the Justices on whether to affirm or reverse the oral order of Judge Ponder of November 19, 1977.



The vote was taken in a "gentlemen's agreement" type of consensus, AND NO ORDER WHATEVER WAS MADE OR ENTERED INTO THE RECORD, OR MADE AVAILABLE TO APPELLANT, NOR TO THE PEOPLE OF ARKANSAS OF THE MANNER IN WHICH THE JUSTICES INDIVIDUALLY VOTED, EXCEPTING MATTHEWS AND WOOTTON FOR AFFIRMATION AND PURTLE FOR REVERSAL.

Thus, it was not even recorded that a majority of members of the court voted in favor of either affirmation or reversal.

Under the law, appellant cannot accept the facts that only TWO Justices voted for Affirmation and only ONE Justice voted for Reversal.

There also is a doubt as to whether a FOUR Justice panel, or a SEVEN Justice panel sat on the case in the secret meeting.

It would have required THREE Justices to have formed a majority if it was a FOUR Justice job, and FOUR Justices to form a majority if it had been a SEVEN Justice court.

Inasmuch as the entire proceedings of the secret meeting, and its subsequent proceedings were illegal under the Arkansas Freedom of Information Act, the Decision in this case, handed down by the Arkansas Supreme Court on February 12, 1979 and affirmed by denying a second hearing on April 30, 1979, is illegal as stated in the last paragraph of Sec. 12-2805 of the Arkansas Freedom of Information Act.

It also is clearly the product of Ancient Star Chamber proceedings which, on many occasions, has been condemned by

the Supreme Court of the United States.

Attention is invited to the Case of *Joseph H. Weston,* Plaintiff, v. *Stephen A. Matthews,* as Acting Chief Justice of the Supreme Court of Arkansas; George Rose Smith, Darrell Hickman, Conley Byrd, and Frank Holt as Justices of the Supreme Court of Arkansas; Richard H. Wootton as Acting Justice of the Supreme Court of Arkansas.

In the Fifty Division of the Circuit Court of Pulaski County, Arkansas (Little Rock), Judge Lowber Hendricks presiding:

(a) In his Order of March 23, 1979, Judge Hendricks, by reason of accepting jurisdiction and ruling thereon, constructively ruled that his court possessed jurisdiction over the persons and offices of the several justices of the Supreme Court of Arkansas (page 62 of Supplemental Record C, on file with this court).

Other parts of his Order, which are probably erroneous, do not obscure or mitigate the essential fact that Judge Hendricks accepted jurisdiction and acted upon it, thereby setting a precedent that Justices of the Arkansas Supreme Court are liable for and answerable to court actions filed under authority of the Arkansas Freedom of Information Act, Sec. 12-801, et sequitur.

Jurisdiction was accepted by Judge Hendricks over the demurrer of W. Russell Meeks III, deputy attorney general as respondent for defendants George Rose Smith, Frank Holt, and Darrell Hickman, (page 20 of Supplemental Record C) and in a separate demurrer for Stephen Matthews and Richard H. Wootton (page 55 of Supplemental Record C).



Justice Conley Byrd, signing pro se, in his Demurrer of March 8, 1979, on page 13 of Supplemental Record C, admits the two following acts, BOTH OF WHICH violate appropriate sections of the Arkansas Freedom of Information Act.

(1) "As a matter of Common and Public knowledge, the opinions of the Supreme Court sitting In Banc are handed down from the Supreme Court's Bench in public view of all the sitting judges and that an opinion so handed down by the Supreme Court represents the views of all of the sitting Supreme Court Justices unless the opinion otherwise indicates.

(2) That the opinions of the full court represent the only record of the votes of the individual Supreme Court Justices as anyone can determine for himself by looking at any of the 262 published volumes of the Arkansas Supreme Court."

Please note that Justice Byrd, in his Demurrer (2) admits that NO written record is made of the manner in which the individual Justices vote as a permanent policy of the court.

This violates Sec. 12-2802 and Sec. 12-2803 (a) and (b) of the Freedom of Information Act. It also denies appellant, or the prople, or the press, any knowledge of how the individual Justices voted, because the opinions handed down each Monday have been arrived at by vote or consensus taken in the regular secret meeting of the court the previous Friday morning.

This violates the third paragraph of Sec. 12-2803 and Sec. 12-2804, Sec. 12-2805 and Sec. 12-2806 of the Freedom of Information Act. The law makes it clear that ALL meetings of governing bodies, except Grand Juries, must be open to the public, that ALL votes on public questions must be taken in full view

and hearing of the public, and that accurate records must be kept, to which the public shall have regular access and right to inspection and copying during reasonable business hours.

## QUESTION NO. 10

**Did the Supreme Court of Arkansas err by failing to enter into the Record any report of the proceedings of the Oral Argument held in the beautiful new circular court room on May 22, 1979?**

The Record reflects only a brief allusion to a minor matter concerning the Oral Argument, found in Chief Justice Matthews' opinion.

On four justices sat for the oral argument; Byrd, Holt, Hickman, and Howard. Assistant Attorney General James E. Smedley spoke for respondents. Joseph H. Weston spoke for himself as appellant.

Mr. Smedley's reply was interrupted by Justice George Howard, Jr., who made a most significant statement that took all of us by surprise, including Mr. Smedley. His statement follows:

"Mr. Weston, I must inform you that the Attorney General (Bill Clinton) has CONCEDED THAT JUDGE PONDER MIGHT WELL HAVE ERRED, and this court finds that Mr. Weston has shown that he has been injured by being jailed, and assessed an excessive bond requiring a cash premium of $400.00 that worked a hardship. This court has ruled on a similar case, *Bolden* v. *State*, in which it was held that a recused judge must avoid even the appearance of resuming jurisdiction in a matter



from which he has been relieved of jurisdiction."

This hearing was recorded on tape for access by SOME, BUT APPARENTLY NOT ALL of the Justices to use in the court, but it was not transcribed and in no way was it entered into the Record, nor made available to appellant to use in this appeal to the U.S. Supreme Court, or for any other purpose, until petitioner's own investigations had disclosed the existence of the tape.

Petitioner Weston feels that these proceedings ought to have been properly entered into the Record, and inasmuch as they were available to some but probably not all members of the court, they ought to have been made available to petitioner on equal terms, as well, and that failure to do so constitutes a violation of Sec. 3, Article II, and Sec. 18, Article II of the Constitution of Arkansas and Amendment XIV to the Constitution of the United States.

It also violates Sec. 12-2802, 12-2803, Sec. 12-2804, Sec. 12-2805, Sec. 12-2806 and Sec. 12-2807 of the Arkansas Freedom of Information Act. A copy of which appears verbatim in the appendix herewith.

This sequestration of the proceedings and subsequent activities of the Arkansas Supreme Court radically changed the course taken by this cause, to great injury to petitioner.

Justice Howard is the first black man to sit on the bench of the Arkansas Supreme Court in more than a hundred years, serving by appointment of now former Governor Pryor.

Further movement of the case was suspended immediately

after the Oral Argument, and was not resumed until the Matthews decision was handed down on February 12, 1979 — a delay of nine months, which was an unusually long time, that violated provisions of the Arkansas Constitution, of the U.S. Constitution, of federal statutes and U.S. Supreme Court Doctrine, all of which demand a speedy trial in a criminal case. The case was originally filed on December 27, 1977—a total of 15 months!

This long delay denied petitioner the value of Justice Howard's opinion, by reason of the expiration of his term of office on December 31, 1978.

It also denied petitioner the value of the opinion of Attorney General Bill Clinton whose term of office expired at the end of 1978, when Clinton moved up to the governorship with an overwhelming popular vote.

This long delay also served to assure there would be no adverse public attention drawn to Judge Ponder, Chancellor Dudley and Prosecutor Blankenship prior to voting in the November 7, 1978 general election, in which all three of them were Democratic candidates for judgeships and were NOT opposed to each other. Blankenship was vigorously opposed by a prominent Batesville lawyer, Keith Rutledge, formerly a Republican, now an Independent. The vote was contested in a recount, and Blankenship was declared winner by less than 200 votes in the entire four-county judicial district by election machinery controlled by Democratic court-house organizations. Weston and his newspaper had begun supporting the independent Rutledge in September, 1977, before the Grand Jury met, and it is almost certain that Blankenship would have been beaten, and probably Ponder also, if Ponder, Blankenship,



Dudley and others had not conspired to put Editor Weston in jail and knock out his crusading Sharp Citizen weekly newspaper.

Incidentally, the Democratic party dictatorship in Arkansas enforces a set of election laws that demands that all state officials who are Democrats, must support all Democratic candidates.

This applies also to justices of the Supreme Court — who are themselves elective, and who must execute an oath of Democratic party loyalty before they can be legally certified by the state secretary of the Democratic party to be placed on the ballot by the Secretary of State.

It's strictly a closed shop factory, and it is not to be expected that the Supreme Court of Arkansas would deliver an embarrassing opinion concerning a circuit judge in an election year, the Constitution and their oath of office notwithstanding.

The operation of the circuit courts and the Arkansas Supreme Court could have been, and probably were, and it could probably be proved, directly influenced by the unconstitutional Election Code of the state of Arkansas.

Editor Weston himself, having twice before been a candidate for the Republican nomination for Governor, had announced prior to the Grand Jury meeting that he was an INDEPENDENT candidate for Governor, but his jailing and bad treatment by the Grand Jury stopped any possibility of obtaining enough signatures to get his name on the ballot.

In a reign of terror by Ponder, Dudley and Blankenship,

the people were reluctant to sign Weston's petition — for fear they would also be jailed along with Weston. It had been done before in Arkansas!

There is enough evidence at hand to prove that the opinions of Justice Howard and Attorney General Bill Clinton were recorded on tape, and that the tape exists today.

Chief Justice Carlton Harris admitted that the tape had been recorded, and went with Weston to the desk of Miss Robin Horne, Deputy Clerk of the Supreme Court, who found that the tape, miracously, had NOT been erased in accordance with an oral policy of the court that tapes must be erased after 30 days. Chief Justice Harris gave Weston permission to have the tape transcribed, at WESTON'S OWN EXPENSE (an estimated $60.00).

Miss Horne still retains custody of the tape, pending the ability of Weston to put up the cost of the transcription, which he cannot now do, (September 12, 1979.)

However, after this petition has been safely filed with Mr. Rodak, clerk of the U.S. Supreme Court on September 27, 1979, petitioner Weston plans to institute a petition to the Arkansas Supreme Court to secure access to pre-transcribed contents of said tape, under provision of Sec. 12-2803, Sec. 12-2804 and Sec. 12-2805 of the Arkansas Freedom of Information Act. When such transcript has been received and certified, it will be forwarded to this Court as a subsequent supplement to the Record, under provisions of

Rule 1A . . . . . "Thereafter (the filing of the Record) the clerk of this court or any party to this case may request



that additional parts of the record be certified and transmitted to this court"

Petitioner questions the propriety, legality, constitutionality, and even the common decency of the court order issued by Judge Robert Dudley in his last subsidiary hearing in the matter of the Grand Jury, held on November 18, 1977.

The order is found on page 31 of the Record of Docket Entries.

Weston, who suffers in the last stages of advanced diabetes, had been in jail for 14 days. His medications, including insulin, which were absolutely necessary to sustain his life, were brought to him daily by his wife, through the thoughtful cooperation of Sheriff Noel Baldridge and his staff. But it was impossible to control three other factors also necessary; quantity measurement of food intake, choice of necessary menu, and precise timing of food intake to correlate with medications.

The quantity of urine sugar on testape began to rise rapidly and had reached the point of maximum measurement, and of immediate danger to Weston when, in order to protect his life, Weston realized he must obtain his freedom from jail and return to the strict diet and medication necessary for an advanced diabetic.

So he agreed to purge himself and was brought into court on November 18, 1977.

The purge was duly ordered by Dudley, but he immediately brought up another subject in which he lacked jurisdiction.

(In Dudley's November 4, 1977 hearing, he had permitted Prosecutor Blankenship to admit as evidence the copy of a pleading in an earlier case in Lawrence County court that Weston had submitted earlier in this trial as evidence to support Weston's plea that Judge Ponder should be disqualified from presiding in court sessions collateral to proceedings of the Grand Jury. (A copy of the plea and Lawrence county pleading are found on pages 1, 2, and 3 of the Record of Docket Entries.)

Weston objected in the November 4 hearing to the introduction of the Lawrence county pleading, but Judge Dudley overruled his objection and permitted prosecutor Blankenship to question Weston.

Then, in the November 18 hearing, Dudley brought up the matter of the Lawrence county pleading, and found Weston guilty of contempt of his (Dudley's) court by reason of filing a malicious and contemptuous pleading in his (Dudley's) court that maligned Judge Ponder, who was at no time during this process in jurisdiction of Dudley's court.

Now here's the catch. Judge Dudley sentenced Weston to a second 14 days in jail for having maligned Judge Ponder BUT AGREED TO ORDER THE SENTENCE TO RUN CONCURRENTLY WITH THE 14 DAYS WESTON HAD ALREADY SPENT IN JAIL IF WESTON WOULD RECANT THE STATEMENTS HE HAD MADE AGAINST PONDER IN THE LAWRENCE COUNTY PLEADING AGAINST PONDER, AND ANY SIMILAR STATEMENTS WESTON HAD MADE OR PUBLISHED AGAINST PONDER ANYWHERE ELSE AT ANY TIME.

Such a demand by Judge Dudley, of course, was a flagrant



violation of the freedom of press Sec. 6, Article II of the Constitution of Arkansas and of the First Amendment to the U.S. Constitution, and violated Weston's rights of free speech, also, because Judge Dudley had quoted, word for word, the matter that Weston must state in his recantation.

Weston knew that, because his diabetes had gone out of control with dangerous testape readings, that another consecutive 14 days in jail would probably kill him, and HAD NO CHOICE, IN ORDER TO PROTECT HIS LIFE, but to perform the recantation under duress so he could return immediately to a proper routine of timed medications and food intake, and proper diet.

Judge Dudley was aware of Weston's illness, and of its seriousness.

Weston has made repeated requests for transcriptions of the two hearings Dudley held on November 4, and of the two hearings he held on November 18, but has been consistently denied access to such transcriptions.

In view of the bizarre surroundings in which this case is set, petitioner Weston contends that the Order of Special Judge Robert Dudley, filed on November 18, 1977 and found on page 31 of the Record of Docket Entries, is an overt act by Judge Dudley to conspire with Ponder and Blankenship, at Weston's expense, to clean up the public image of Ponder. It is to be noted that Dudley, Ponder and Blankenship were all candidates for election to Judgeships in contiguous and adjacent jurisdictions and were not opposed to each other.

Weston admits that he had given Judge Ponder just cause

to hate him, by persistently publishing an article describing the "Justice for Sale" racket that Andrew Ponder, as circuit judge, and his brother, Lawyer Harry Ponder, in regular practice in Lawrence County before Judge Andrew Ponder, had operated for many years, and are still operating today, in which the lawyer Harry Ponder is in a position to guarantee in advance what his client's verdict will be because his brother Andrew is the Judge.

Another frequently-run article in Weston's Sharp Citizen pointed out the same sort of scandalous situation that did exist and does exist today, in Jackson County, where Andrew Ponder is Circuit Judge and his brother-in-law Fred Pickens, a lawyer, have grown wealthy by manipulating cases passing through the Jackson County Circuit Court.

And in exercising his rights of freedom of the press and political criticism with the Sharp Citizen in the public interest of clean politics and honest courts, Weston has literally and actually risked his life over a period of seven years.



## STATEMENT OF THE CASE

In the total absence of a criminal libel law in Arkansas by reason of its having been in 1975 declared wholly unconstitutional by Special Justice Leroy Autry of the Arkansas Supreme Court, in heavy reliance upon rulings of the U.S. Supreme Court in *New York Times* v. *Sullivan* and *Garrison* v. *Louisiana*, Judge Ponder and his associates in October, 1977, set up an entrapment use of the Grand Jury to punish petitioner Weston for having published articles that embarrassed them in their candidacies for re-election.

The opinion of Special Justice Autry is reproduced in full in the appendix to this petition under the style of Joseph H. Weston vs State of Arkansas, CR 75-49, 528 S.W.2d 412.

Prosecuting Attorney Leroy Blankenship, Circuit Judge Andrew G. Ponder, Special Circuit Judge Robert Dudley, Grand Jury Foreman Veta M. Gordon, all of them being officials of Independence County, Arkansas, and Trooper Carroll Seaton, a member of the Arkansas State Police, conspired among themselves and with others, to use the processes of the Grand Jury, the circuit court, and laws, customs and Rules of Court procedure of the State of Arkansas that govern the activities of the grand jury and courts, to suppress publication of the Sharp Citizen weekly newspaper published by Joseph H. Weston at Cave City, Arkansas 72521.

Thier official actions under color and authority of Arkansas laws and customs began on October 17, 1977 and concluded on November 19, 1977, and resulted in the actual suppression of the Sharp Citizen, in violation of Weston's rights of free press under the First Amendment to the U.S. Constitution, and in the

sentencing of Editor Weston to six months in jail (of which he actually served 14 days) and a cost of $400.00 in cash for the premium on a $4,000.00 bond.

Cooperating and conspiring with the above-listed five public officials, and in violation of state and federal laws of conspiracy and organized crime, were a Batesville lawyer, John Norman Harkey who as an officer of the court, filed a million dollar libel lawsuit against Weston that was timed in conspiracy with Blankenship to coincide with the Grand Jury and a trial planned to result therefrom, with the object of influencing the jury in the prospective criminal trial of Weston. Harkey also submitted to Weston, under authority of Arkansas law in this suit, long lists of interrogatories and admissions timed and aimed at entrapping Weston into testimony that could be used against him in his proposed and conspired criminal trial.

Furthermore, in pgs. 7, 8, 9, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92 of the Record of Docket Entries, Harkey, a lawyer and officer of the court, filed a heavy damage suit against one of Weston's newspaper vendors aimed at stopping the sale of the Sharp Citizen, and such stoppage was effected by fear and terrorism. (Pages 82, 93, 94, 95, 96, of Record of Docket Entries).

Sale of the newspaper was effectively stopped.

All of the material listed on Pages 7, 8, 9, 83, 84, 85, 86, 87, 88, 89, 90, 91 and 92 of the Docket Entry Record was submitted by appellant to the Arkansas Supreme Court for placement into the record as a matter of judicial knowledge.

On May 8, 1979, an unsigned order of the Arkansas Supreme Court denied appellant's petition to supplement the



record with the material listed in the foregoing paragraph. (Page 97 of Record of Docket Entries).

Also conspiring and acting in conspiracy with Blankenship, Ponder, and others, were local and state-wide officials of the appellant's church, the Church of Jesus Christ of Latter-day Saints (Mormon).

In conspiracy with, and under the influence of John Norman Harkey, the president of Weston's home branch of the LDS Church, at Batesville, Ark., R. Ford Wilkinson, and the state-wide president of the LDS Church, J. Lynn Mellor of North Little Rock, Ark., timed an ecclesiastical trial for the excommunication and smearing of Weston to coincide with the Grand Jury proceedings and criminal trial. Weston was actually in jail for contempt when the date for the ecclesiastical trial was scheduled, but the trial was held later and Weston was in fact excommunicated and smeared in a secret trial in which it was charged that Weston's Sharp Citizen newspaper, due to his prominence throughout the state and his identity as a High Priest of the church, had badly hampered the work of Mormon missionaries in the state and had embarrassed them.

The association between John Norman Harkey, the lawyer, and R. Ford Wilkinson, the church's congregation leader at Batesville had extended over a long period of time during which Harkey had performed free legal services for needy members of Wilkinson's flock, and during which Blankenship's deputy prosecuting attorney, Philip Farris, sharing the same office with Blankenship, had performed intricate title search and other real estate procedures at no cost, or only nominal cost, for Wilkinson in the matter of the purchase of a church building.

The ecclesiastical court trial cannot be defended as an act of Freedom of Religion because it violated due process and conspiracy laws of Arkansas and possibly conspiracy and organized crime statutes of the United States, and deprived Weston of a valuable property without due process of law and in violent conflict with the Constitutions of Arkansas and of the United States.

In a subsidiary hearing, held while meetings of the Grand Jury were still in progress, Judge Robert Dudley found Weston in contempt of court and sentenced him to six months in jail. His Order appears on Page 27 of the Record of Docket Entries.

Weston was NOT arrested in this action, but was taken directly before Judge Dudley from the Grand Jury. There was NO arraignment, NO time for Weston to prepare a defense, NO opportunity given Weston to present witnesses, nor to subpoena hostile witnesses.

In the hearing, Judge Dudley found that Weston was guilty of malice in publishing the prostitution ring article, after Weston had claimed protection of the newsman's "Shield" Law, found in Section VI, on page 14 of the Record of Docket Entries, but offered no opportunity to Weston to defend himself. Weston entered the secret court session as a witness and a free man and was taken out to the county jail a few minutes later as a six-month convict, without due process of law. Weston actually served 14 days in jail. Judge Dudley's Order of November 4, 1977 does not reflect his pronouncement from the bench, and a transcript of the proceedings has been denied Weston, despite many requests.

The transcript of another subsidiary hearing held by



Dudley on November 18, 1977, and proceedings held by Judge Ponder on November 19, 1977 have been steadily and frequently refused to plaintiff Weston, and Acting Chief Justice Matthews of the State Supremc Court affirmed the November 19, 1977 order of Judge Ponder — after having in the same opinion denied its existence, and after the Supreme Court had refused to issue a proper order to Judge Ponder to produce the order and enter it in the Record.

The November 19, 1977 oral order of Judge Ponder was the final order of the Judicial hearings associated with the Grand Jury, which had been empanelled by Judge Ponder on October 17, 1977.

## INTERESTED PARTIES

Bill Clinton, Governor of Arkansas; State Capitol, Little Rock, Ark.

Carlton Harris, Chief Justice Supreme Court; Justice Bldg., State Capitol, Little Rock, Ark.

Steve Clark, Attorney General; Justice Bldg., State Capitol, Little Rock, Ark.

Stephen A. Matthews, Acting Chief Justice; Pine Bluff, Ark.

John Fogleman, Conley Byrd, Frank Holt, Darrell Hickman, and John I. Purtle, Supreme Court Justices; Justice Bldg., State Capitol, Little Rock, Ark. and George Rose Smith, Supreme Court Justice; Justice Bldg., State Capitol, Little Rock, Ark.

George Howard, Jr., former Justice; c/o Arkansas Appeals Court, Justice Bldg. as above

Richard H. Wootton, Acting Justice; Hot Springs, Ark.

W. Russel Meeks III, Deputy Attorney General; Joe Purvis, Deputy Attorney General; and James E. Smedley, Assistant Attorney General; All of Justice Bldg., as above

Lowber Hendricks, Circuit Judge; County Courthouse, Little Rock, Ark.



H. A. Taylor, Circuit Judge; County Courthouse, Pine Bluff, Ark.

Andrew G. Ponder, Circuit Judge; County Courthouse, Newport, Ark.

Leroy Blankenship, Circuit Judge; County Courthouse, Batesville, Ark.

Robert Dudley, Chancellor; County Courthouse, Pocahontas, Ark.

T. J. Hively, Prosecuting Attorney; and Wesley Ketts, Jr., Deputy Prosecuting Attorney; Both of Main Street, Batesville, Ark.

Philip Farris, former Deputy Prosecutor; College Street, Batesville, Ark.

William "Bill" Harkey, Circuit Clerk; County Courthouse, Batesville, Ark.

Noel Baldridge, Sheriff; County Courthouse, Batesville, Ark.

Andrew Frolos, former Deputy Sheriff; Cave City, Ark. 72521

Veta M. Gordon, Foreman of 1977 Grand Jury; Pleasant Plains, Ark.

Other members of the Grand Jury as follows:

Clyde J. Phillips, Polly Gay Bennett, Pauline R. Robertson, Marcus E. Branscum, Jay S. Laney, Jimmy F. Martin, Thomas Evans Glenn, Paul E. Mason, Dora E. Hix, Verna Mae Hebisen, Raymond La Croix and Lillie Mae Morgan.

All of the above named persons are or were at the time of the circuit court proceedings in his cause, officials or employees of the state of Arkansas or one of its subdivisions.

The Attorney General of Arkansas is designated by Ark. Stat. Ann. Sec. 12-701 (Repl 1968) to be the attorney and Respondent for officials and departments of the state, and representation of all above-listed interested parties should be handled through and by his office.

## OTHER INTERESTED PARTIES

Charles Patterson, c/o attorney Steve Engstrom, Little Rock, Ark.

R. Ford Wilkinson, College Street, Batesville, Ark.

J. Lynn Mellor, North Little Rock, Ark.

John Norman Harkey, attorney, Batesville, Ark.

Roy Ockert Jr., Managing Editor, Batesville Guard, Batesville, Ark.

## PARTIES IN AGREEMENT

Interested parties who have expressed views or made news reports in agreement with petitioner and who might desire to



present briefs in support of petitioner pursuant to authority of Rule 10 (4) of the U.S. Supreme Court are listed below.

The first brief of such parties must be filed within thirty days after receipt of this petition, and subsequent briefs must be filed within the time frame allowed to petitioner.

Governor Bill Clinton

Former Justice George Howard

Justice John I. Purtle

Charles Patterson

Roy Ockert, Jr.

## SUMMARIZATION

Although working under severe handicaps; a very painful physical condition, funds extremely limited to a Veteran's pension, necessity to travel a round-trip distance of 250 miles to the State Supreme Court's library at Little Rock, deep-seated prejudice of laws, customs and rules to discourage pro se law practice (for example the University of Arkansas Law School at Little Rock forbade me to use research services that students render for lawyers because I was not licensed as such), deliberate destruction of court records and failure to file orders — I have done my best to provide a case that is acceptable to the Supreme Court of the United States, and that can provide me personally, my family, and the people of Arkansas with much needed relief.

In seeking this relief, I do NOT IN ANY WAY WHATSOEVER waive any claims or rights I might possess to further seek relief in civil actions against any or all of the conspirators who suppressed my newspaper.

Although this clearly is a Civil Rights Case, it does not involve RACIAL oppression as far as I, personally, or my family is concerned. I am of Anglo-Saxon White Protestant descent, and am myself, on the paternal side of my family, the product of 13 generations on American soil, nearly all of them preachers, teachers, editors, writers, lawyers and frontier judges.

I am grateful for the opportunity to present this petition to the Supreme Court, and especially grateful that Mr. Justice Blackmun was able to extend my time for filing, that had been consumed by illness and other impediments shown above.



It will be necessary for me to return to a veteran's hospital early in October for surgery by laser beam on my eyes to halt and correct the ravages of diabetes upon them.

However, I hold myself in readiness to come to Washington for Oral Argument and would consider it an honor worthy to be handed down to my posterity to participate in such an historic occasion in an attempt to free my beloved State of Arkansas of a court system that is still, in many locations, operating in procedures inherited directly from the Middle Ages of England.

If this court can find means to grant certiori.

Respectfully,

JOSEPH H. WESTON
*pro se*
P. O. Box 84
CAVE CITY, ARKANSAS 72521

A signed copy of this petition is on file with the Clerk of the Supreme Court of the United States.

## AFFIDAVIT OF SERVICE
## SUBMITTED IN COMPLIANCE WITH RULE 33 (C)

I, Joseph H. Weston, petitioner pro se, hereby swear and affirm that I have begun the service of at least one copy of this petition to each person whose name appears on the list of Interested Persons herein — on the same day I have mailed 40 copies of the petition to the clerk of the Supreme Court of the United States.

Receipt of the petition by all interested parties is expected to be effected on or before October 10, 1979.

Most of the petitions are being delivered by mail, but others, especially those clustered at the Justice Building in Little Rock, are being delivered in person, this being more convenient and less costly.

Joseph H. Weston, *pro se*
Box 84, Cave City, Ark. 72521



## NOTARIZATION

Joseph H. Weston, a person well known to me, has appeared before me this _____ day of September, 1979 and sworn and affirmed that all statements in the foregoing instrument are true and correct, to the best of his knowledge and belief.

Notary Public _____

My Commission Expires: _____

A signed copy of this Affidavit of Service and signed and sealed copy of its Notarization are on file with the Clerk of the Supreme Court of the United States.

# APPENDIX

## LAW OR CHANCERY MANDATE

STATE OF ARKANSAS, )
In the Supreme Court ) SCT.

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas begun and held at the Court Room in the City of Little Rock, on the 2nd day, being the first Monday of October, A.D. 1978, amongst others were the following proceedings, to-wit:

On the 30th day of April, A.D. 1979, a day of said term

---

JOSEPH H. WESTON, Appellant

Appeal from Independence County Circuit Court

No. vs.

STATE OF ARKANSAS, Appellee

Rehearing denied. Harris, C.J., and Fogleman, J., not participating.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the city of Little Rock, this 22nd day of August, A.D. 1979.

JIMMY H. HAWKINS
Clerk
By: CINDIA FOREMAN, D.C.



## IN THE SUPREME COURT OF ARKANSAS
## ORDER CONCERNING ASSIGNMENT OF JUDGES
No. 77-136

Under the authority vested in the Chief Justice of the Supreme Court of Arkansas by Act 496 of 1965 as amended, Judge H.A. Taylor of the Eleventh Judicial Circuit is hereby assigned to the Third Judicial Circuit to try the cases of:

State vs. Joseph H. Weston
Independence Circuit No. CR-77-133
and
Jackie Hall et al vs. Joseph H. Weston
Independence Circuit No. CIV-77-190

Filed: at 10:30 a.m., December 15, 1977, W.M. Harkey, Clerk and Recorder

This assignment includes all ancillary proceedings which may arise in connection with said causes and proceedings subsequent thereto shall be held at such time or times as shall be directed and ordered by Judge H.A. Taylor.

The assignment of Judge H.A. Taylor to the Third Judicial Circuit entails only additional duties, and jurisdiction in the Eleventh Judicial Circuit shall remain in Judge H.A. Taylor to the same extent as though this assignment had not been made.

SPECIAL PROVISIONS: None

This order made and entered this 13th day of December, 1977.

Filed: December 14, 1977

CARLETON HARRIS
Chief Justice

SUPREME COURT OF ARKANSAS
(In Banc)

No. CR 77-238

Opinion delivered February 12, 1979

Appeal from Independence Circuit Court, Andrew Ponder, Circuit Judge; Robert Dudley, Special Judge

Joseph H. Weston ..... Appellant

vs.

State of Arkansas (Independence County Grand Jury) ..... Appellee

Affirmed.

Stephen A. Matthews, Special Chief Justice:

Appellant seeks relief in this Court from an indictment returned against him by an Independence County Grand Jury charging him with four counts of perjury. A brief statement of the factual background follows.

Appellant, the editor and publisher of a Sharp County newspaper, published an article in the September 19, 1977 issue of his paper alleging the existence of a prostitution ring, and



other vice operations and narcotics traffic in Independence County. An Independence County Grand Jury investigated the matter and concluded its activity on November 19, 1977 by returning a four-count indictment for perjury against appellant, arising out of his testimony before the Grand Jury.

Throughout the course of the Grand Jury investigation, appellant filed numerous pleadings in the Independence Circuit Court, including a Motion to Quash the Grand Jury on November 3, 1977. The thrust of this motion was that the Grand Jury was a tool of corrupt law enforcement officials and judges who had set out on a course designed to harrass and intimidate appellant and to drive him and his newspaper out of business.

Because of the pendency of a lawsuit in Lawrence County in which appellant and Circuit Judge Andrew Ponder were adversary parties, Judge Ponder recused himself, and on October 25, 1977, Chancellor Robert Dudley of Pocahontas was assigned to

> ". . . hear All Matters Pertaining to Joseph H. Weston's Appearance Before the Independence County Grand Jury. This assignment includes all ancillary proceedings which may arise in connection with said cause and proceedings subsequent thereto."

This assignment was made by the Chief Justice of this Court pursuant to the authority of Arkansas Statute 22-142.

Appellant asserts in his Brief and in oral argument that on November 18, 1977 Judge Dudley "abandoned" the case and that Judge Ponder erroneously resumed jurisdiction and on

November 19, took certain improper action, including granting immunity to a witness named Patterson and "forcing" Patterson to testify against appellant, accepting the report of the Grand Jury, ordering the arrest of appellant, and fixing the amount of appellant's bail bond. One of the troubles with appellant's contentions is that the official record before this Court does not show that Judge Ponder took this action. Only the statements of appellant in his brief and his various pleadings, and a copy of a newspaper clipping appellant lodged with this Court, indicate such action by Judge Ponder.

It is virtually impossible for us to determine the relief appellant seeks. In his Reply Brief he says:

> "An examination of my Briefs and pleadings will show that my appeal is NOT directly based upon the indictments themselves, per se.
>
> "At the risk of being rebuked for violation of various rules of court procedure, I am directly appealing the erroneous conduct of two wilful judges and a crooked prosecuting attorney. The grand jury was only the willing and ignorant tool and these two judges — and their courts — and of Blankenship."

In another place in his Reply Brief, appellant says he seeks from this Court:

> "An order to quash en toto all activities of the corrupt Independence County Grand Jury from October 18, 1977 to November 19, 1977, inclusive.
>
> "A reversal of all orders of all judges, written or otherwise,



> oral or otherwise, entered in the court record or not entered in the court record, issued or acted upon in open court or in secret sessions, or otherwise acted upon, lawful or unlawful, that were issued in any way in connection with or in association with activities of the Grand Jury during its entire term."

Apparently appellant hopes this Court will fashion some unspecified form of relief for him, delivering him from, and rebuking, those whom he counts as his oppressors.

It should be noted that appellant has not moved that the indictment against him be quashed. The nearest he has come to such a request is his motion to quash the Grand Jury panel filed on November 3, 1977 and denied by Judge Dudley on November 4. This took place two weeks before the indictment was returned against appellant.

We decline, at this stage of the proceedings, to disturb the indictments against appellant for three reasons.

First, there is no appealable order before us. See *Alexander* v. *State*, 260 Ark. 785, 545 S.W. 2d 606 (1976); and *State* v. *Langstaff*, 231 Ark. 736, 332 S.W. 2d 614 (1960). Appellant has been indicted, but he has not been convicted of any offense. We have been cited to no authority holding that a right of appeal exists from an indictment by a Grand Jury. Rule 36.1 of the Rules of Criminal Procedure provides in part:

> "Any person convicted of a misdemeanor or a felony by virtue of a trial in any circuit court of this State has the right to appeal to the Supreme Court of Arkansas."

This provision is practically identical to Ark. Stat. 43-2701.

Because of the absence of a final order of the trial court settling some issue against appellant, or finding him guilty of some offense, an appeal to this court will not lie at this stage of the proceeding.

Second, we are committed to the rule that we will not review matters not in the record. *Harvey* v. *Castleberry,* 258 Ark. 722, 529 S.W. 2d 324 (1975); *Poindexter* v. *Cole,* 239 Ark. 471, 389 S.W. 2d 869 (1965); *Becker* v. *Rogers,* 235 Ark. 603, 361 S.W. 2d 262 (1962); and *Jernigan* v. *Pfeifer Brothers,* 177 Ark. 145, 5 S.W. 2d 941 (1928). In *Becker,* we said:

> "At the outset, let it be mentioned that the briefs contain, and make reference to, many matters that do not appear in the record. Appellee's brief, in large measure, is devoted to extraneous material, and appellants, in their reply brief, to some extent, follow the same practice. The fact that we do not consider statements beyond the record is so axiomatic as to require no citation of authority."

The "record" appellant presents us pertaining to the alleged actions of Judge Ponder consists of a newspaper account of appellant's indictment and appellant's own assertions in his brief.

Nor will we afford relief which is not first sought in the trial court and denied. *Bond* v. *State,* 230 Ark. 962, 328 S.W. 2d 369 (1959); *Hicks* v. *State,* 225 Ark. 916, 287 S.W. 2d 12 (1956); and *Yarbrough* v. *State,* 206 Ark. 549, 176 S.W. 2d 702 (1944).

The only relief appellant sought in the Independence Circuit Court which he now seeks here, as far as we can ascertain, is that the Independence County Grand Jury be quashed from its inception. The *record* filed in this Court, disregarding appellant's assertions and the newspaper account, which cannot be treated as a "record," does not establish any basis for the granting of such relief.



Third, appellant's brief is in flagrant disregard of Rule 9 of this Court. His statement of the case, instead of being a concise statement of the case, without argument, as required by Rule 9(b) is a highly partisan account of what he believes to be injustices perpetrated upon him by those whom he perceives to be his enemies. More importantly, the abstract is in no sense an impartial condensation of the record, without comment or emphasis, as required by Rule 9(d).

Rule 9 does not exist as a snare for unwitting litigants or for those who appear before the Court, pro se. In fact, we are inclined to be more lenient in invoking Rule 9 in the case of persons appearing pro se than in other cases. But the jurisdiction of this Court is limited to appellate jurisdiction only. Arkansas Constitution, Article 7, Section 4; Ark. Stat. 27-2101. We do not try anew all litigation, or come to the assistance of appellants, pro se or otherwise, by combing the record and re-writing their pleadings for them and re-shaping their prayers into some form of relief which this Court may grant. We look only to see if the record shows that the trial court committed an error prejudicial to the appealing party. To aid in a speedy determination of appeals we, along with most other appellate courts, have promulgated Rule 9(d) placing upon appellants the burden of furnishing an abstract of the record consisting of an impartial condensation, without comment or emphasis, of only such material parts of the pleadings, proceedings, facts, documents

and other matters in the record as are necessary to an understanding of all questions presented to this Court for decision.

Our refusal to afford appellant relief at this stage of the proceedings is based on all or any of the three reasons set out above, i.e., no appealable order is before us, the record does not support appellant's position and there has been no compliance with Rule 9.

We do not hold that appellant is precluded from questioning the validity of the indictment which the Grand Jury returned against him. Nothing in this opinion prejudices a proper attack on the indictment. If appellant is tried and convicted and then chooses to attack the indictment by pleadings presented first in the trial court, basing his attack on matters reflected in the record, certainly the validity of the indictments may be examined. In fact, we take this occasion to observe that if the regular presiding Circuit Judge of Independence County, who had recused himself from taking any part in the Grand Jury proceedings involving appellant, did in fact resume jurisdiction over matters involving appellant and take discretionary action, it may well be that the indictment cannot stand if it is questioned on an appeal from a conviction. *Bolden* v. *State*, 262 Ark. 718, 561 S.W. 2d 281 (1978). If no stenographic record of the proceedings was made, our procedure permits the omission to be supplied by a bystander's bill of exceptions. *Graham* v. *State*, 264 Ark. 489, 572 S.W. 2d 385 (1978).

Affirmed.

Special Justice Richard H. Wootton joins in the opinion.

Harris, C.J., and Fogleman, J., not participating.



Purtle, J., dissents.

John I. Purtle, dissenting. The appellant, Joseph H. Weston, formerly published a newspaper known as the Sharp Citizen. I understand the word Sharp is used in honor of or to designate the county rather than in its ordinary meaning. There is little doubt that appellant had the ability to arouse the ire of public officials and other citizens to a degree seldom equalled by any editor or publisher. Nevertheless, he was producing a newspaper which was entitled to all the rights and protection enjoyed by other media vehicles pursuant to the state and federal Constitutions. Although his publication was not in conformity with our standard publications, it nevertheless was a "freedom of the press" product.

Ark. Const. Art. 2, §6, states:

> Liberty of the press and of speech — Libel. — The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted.

This provision has been in full force and effect since 1874, thereby giving the distinct impression that the people of Arkansas are satisfied with it. This Article has built into it a measure of protection to the innocent people and proper restraints

against abuse of the press. It provides all persons may freely write and publish their sentiments on all subjects, *being responsible for the abuse of such right*. It further provides that the truth of any such matters so published shall be a defense to any action for libel. I know of no instance where a judgment has been rendered against appellant on account of articles published by him.

Appellant is not a lawyer, and there is no question but that this Court would be justified under the normal interpretation of our rules in dismissing his appeal. However, under unusual circumstances, the Court has waived the rules. In all probability, we are going to review this case again. Nevertheless, we ought to be able to rule on it with some degree of finality the next time it comes. We will be unable to do so unless we, at least, give some guidelines to be followed before it is again before us.

It can be determined from appellant's brief that he is clearly urging he has been punished for exercising his rights as guaranteed by the Constitution. We are also able to determine that some of the events which occurred are not in the record, nor will they be in the record when it is next before us. If one judge was relieved of all responsibilities of the Joseph H. Weston matter, and another undertook to handle these same matters, then it was not proper for the judge so relieved to assume jurisdiction again without proper authority. It is alleged by appellant, and not disputed by the state, that the recused judge happened to be in Independence County on Saturday, November 19, 1977, when the Grand Jury returned the indictments against the appellant. The recused judge granted immunity to a witness before the Grand Jury, denied a motion made by appellant, met with the Grand Jury, and accepted their report. Only the judge having jurisdiction of the case



should have performed these acts, if in fact they were performed, and the record, such as it is, appears to establish these facts. When the case arrives here again, this matter will still be unresolved because it is not "officially" in the record and we will then be compelled to send it back.

Essentially, appellant is asking this Court to dismiss the indictments. The state admits an appeal will lie from the denial of a motion to dismiss an indictment. If this is the law, then we really have an appealable order before us even though the words are not expressed in those exact terms. There is no question that appellant raised every issue possible at every stage of the proceedings. His ideas are not presented for the first time on appeal.

The minutes of the Grand Jury have apparently never been furnished to appellant. If the prosecutor was in fact directing the whole proceedings and was present during the deliberation of the Grand Jury, it is a reversible error. Some parts of the record were found after this Court entered a mandate to the lower court. The record is still technically incomplete.

Appellant earnestly contends throughout every stage of the proceedings that he is being persecuted for the exercise of his freedom of speech. If only a portion of his allegations are true, he has merit to his arguments. Our Bill of Rights was instituted to end the restraints which at one time had been imposed upon the people of England. These rights have, no doubt, been a mighty force in guiding this nation to its present degree of greatness among tte nations of the world and remains a cornerstone or foundation to our Republic and its democratic processes. There are times when we feel these privileges and rights are abused, but such thoughts are usually of a short dura-

tion. Although appellant may have been viewed as a pusillanimous polecat by some people, he may have been nevertheless exercising his rights as guaranteed by the Constitution.

In view of the state of the record and all of the implications and allegations, I would reverse and return this case to the lower court for a fresh start from the beginning, if there is still a desire to prosecute the appellant.

Supreme Court of the United States

No. A-56

Joseph H. Weston Petitioner

v. CR77-238

Arkansas

## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is



hereby, extended to and including September 27, 1979.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 21st day of July, 1979.

## ARKANSAS FREEDOM OF INFORMATION ACT

Act 93 of 1967

As amended by Act 1201 of 1976 and Act 652 of 1977.

Section 12-2801. TITLE OF ACT. — This Act shall be known and cited as the "Freedom of Information Act" of 1967.

Section 12-2802. DECLARATION OF PUBLIC POLICY. — It is vital in a democratic society that public business be performed in an open and public manner so that the electors shall be advised of the performance of public officials and of the decisions that are reached in public activity and in making public policy. Toward this end, this act is adopted, making it possible for them, or their representatives, to learn and to report fully the activities of their public officials.

Section 12-2803. DEFINITIONS. — "Public records" are writings, recorded sounds, films, tapes, or data compilations in any form

(a) required by law to be kept, or

(b) otherwise kept and which constitute a record of the performance or lack of performance of official functions which are or should be carried out by a public official or employee, a governmental agency, or any other agency wholly or partially supported by public funds or expending public funds.

All records maintained in public offices or by public employees within the scope of their employment shall be presumed to be public records. Provided, that compilations, lists, or other aggregations of "personal information", determined to be confidential by the State Information Practices Board pursuant to its duties set forth in sub-section 2 of subsection (k) of Section 4 of Act 730 of 1975, being Arkansas Stat. Ann. 16-801, et. seq., shall not be considered to be "Public Records" within the terms of this Act and shall not be supplied to private individuals or organizations.

"Public meeting" are the meetings of any bureau, commission or agency of the State, or any political subdivision of the State, including municipalities and counties, boards of education, and all other boards, bureaus, commissions or organizations in the State of Arkansas, except grand juries, supported wholly or in part by public funds, or expending public funds.

Section 12-2804. EXAMINATION AND COPYING OF PUBLIC RECORDS. — Except as otherwise specifically provided herein, by laws now in effect, or laws hereinafter specifically enacted to provide otherwise, all public records shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of



the records. It is the specific intent of this Section that State income tax returns; medical, scholastic, and adoption records; the site files and records maintained by the Arkansas Historic Preservation Program and the Arkansas Archeological Survey; grand jury minutes; unpublished drafts of judicial or quasi-judicial opinions and decisions; undisclosed investigations by law enforcement agencies of suspected criminal activity; unpublished memoranda, working papers, and correspondence of the Governor, Legislators, Supreme Court Justices, and the Attorney General; documents which are protected from disclosure by order or rule of court; files which, if disclosed, would give advantage to competitors or bidders; and other similar records which by law are required to be closed to the public shall not be deemed to be made open to the public under the provisions of this Act.

Reasonable access to public records and reasonable comforts and facilities for the full exercise of the right to inspect and copy such records shall not be denied to any citizen.

If a public record is in active use or in storage and, therefore, not available, at the time a citizen asks to examine it, the custodian shall certify this fact in writing to the applicant and set a date and hour within three (3) days, at which time the record will be available for the exercise of the right given by this Act.

Section 12-2805. OPEN PUBLIC MEETINGS. — Except as otherwise specifically provided by law, all meetings, formal or informal, special or regular, of the governing bodies of all municipalities, counties, townships, and school districts, and all boards, bureaus, commission, or organizations of the State of Arkansas, except Grand Juries, supported wholly or in part by

public funds, or expending public funds, shall be public meetings.

The time and place of each regular meeting shall be furnished to anyone who requests the information.

In the event of emergency, or special meetings the person calling such a meeting shall notify the representatives of the newspapers, radio stations and television stations, if any, located in the county in which the meeting is to be held and which have requested to be so notified of such emergency or special meetings, of the time, place and date at least two (2) hours before such a meeting takes place in order that the public shall have representatives at the meeting.

Executive sessions will be permitted only for the purpose of considering employment, appointment, promotion, demotion, disciplining or resignation of any public officer or employee.

(a) Only the person holding the top administrative position in the public agency, department, or office involved; the immediate supervisor of the employee involved; and the employee may be present at the executive session when so requested by the governing body, board, commission or other public body holding the executive session.

(b) Any person being interviewed for the top administrative position in the public agency, department, or office involved may be present at the executive session when so requested by the governing board, commission or other public body holding the executive session.

Executive sessions must never be called for the purpose of defeating the reason or the spirit of the Freedom of Information Act.



No resolution, ordinance, rule, contract, regulation or motion considered or arrived at in executive session will be legal unless following the executive session, the public body reconvenes in public session and presents and votes on such resolution, ordinance, rule, contract, regulation, or motion.

Section 12-1806. ENFORCEMENT. — Any citizen denied the rights granted to him by this Act may appeal immediately from such denial to the Pulaski Circuit Court, or to the Circuit Court of the residence of the aggrieved party, if an agency of the State is involved, or to any of the Circuit Courts of the appropriate judicial districts when an agency of a county, municipality, township or school district, or a private organization supported by or expending public funds is involved. Upon written application of the person denied the rights provided for in this Act, or any interested party, it shall be mandatory upon the Circuit Court having jurisdiction, to fix and assess a day the petition is to be heard within seven days of the date of the application of the petitioner, and to hear and determine the case. Those who refuse to comply with the orders of the court shall be found guilty of contempt of the court.

Section 12-2807. PENALTY. — Any person who willfully and knowingly violates any of the provisions of this Act shall be guilty of a misdemeanor and shall be punished by a fine of not more than $200, or 30 days in jail, or both.

**Truman BOLDEN and Dozier BOLDEN**
***v.* STATE of Arkansas**

**CR 77-89** **561 S.W. 2d 281**

**Opinion delivered January 30, 1978**
**(Division I)**

[Rehearing denied March 6, 1978.]

1. COURTS — DISQUALIFICATION OF JUDGE — LIMITED JUDICIAL CAPACITY TO ACT FURTHER. — Where a judge announced from the bench and for the record at the inception of a pretrial conference that he was voluntarily disqualifying himself from participating in the case, he lost jurisdiction of the case and was without authority to act further in any judicial capacity except to make the proper transfer of the case or take the appropriate steps for the selection of another judge.
2. COURTS — PROPER ADMINISTRATION OF LAW — JUDGE MUST AVOID ALL APPEARANCES OF UNFAIRNESS. — The proper administration of the law requires not only that judges refrain from actual bias, but also that they avoid all appearances of unfairness.
3. TRIAL — VERDICT FORMS — SUBMISSION OF ERRONEOUS VERDICT FORMS TO JURY REVERSIBLE ERROR. — Reversible error was committed where the verdict forms submitted to a jury provided blank spaces for the jury, upon a finding of guilty, to insert the number of years imprisonment "and" the amount of fine assessed, instead of using the terminology "and/or", thereby indicating to the jury that the assessment of both fine and imprisonment was mandatory, while under Arkansas law the enforcement of penalties is optional with the jury.
4. CRIMINAL LAW — ARREST — PROMPT HEARING REQUIRED FOR DETERMINATION OF PROBABLE CAUSE. — An arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay to the end that a judicial determination of probable cause may be made as a prerequisite to extended restraint of the arrestee's liberty following arrest.
5. ARKANSAS RULES OF CRIMINAL PROCEDURE — RULE 8.1 PROVIDING THAT ARRESTED PERSON BE TAKEN BEFORE JUDICIAL OFFICER PROMPTLY — PURPOSE. — Rule 8.1, Ark. Rules of Crim. Proc., which provides that an arrested person who is not released by citation or by other lawful manner shall be taken before a judicial officer without unnecessary delay, is designed and has its purpose to afford an arrestee protection against unfounded invasion of liberty and privacy, and is mandatory.
6. CRIMINAL LAW — ARREST — CONSTITUTIONAL RIGHTS OF PERSON ARRESTED. — The right of a person under arrest to be taken before a judicial officer without unnecessary delay where he will have the charges explained to him, will be advised of his constitutional rights, and will have counsel appointed for him if an indigent, and arrangements for bail expedited, are basic and fundamental rights secured to every arrestee under state and federal constitutions.
7. CRIMINAL LAW — FAILURE TO TAKE PERSON ARRESTED BEFORE JUDICIAL OFFICER WITHOUT UNNECESSARY DELAY — DISMISSAL OF CHARGES NOT REQUIRED. — The failure to take a person under arrest before a judicial officer without unnecessary delay, as required by Rule 8.1, Ark. Rules of Crim. Proc. (1976), does not dictate dismissal of the charges.
8. CRIMINAL LAW — PROSECUTION BY INFORMATION — JUDICIAL HEARING NOT PREREQUISITE. — A judicial hearing is not prerequisite to prosecution by information.
9. CRIMINAL LAW — ILLEGAL ARREST OR DETENTION — SUBSEQUENT CONVICTION NOT VOIDED. — Illegal arrest or detention does not void a subsequent conviction.



Appeal from St. Francis Circuit Court, First Division, *John L. Anderson*, Judge; reversed and remanded.

*E. Alvin Schay* and *Leon Marks*, for appellants.

*Bill Clinton*, Atty. Gen., by: *Joyce Williams Warren*, Asst. Atty. Gen., for appellee.

GEORGE HOWARD, JR., Justice. The issue to be resolved is whether the trial court committed prejudicial errors in the course of appellants' trial, and if so, if these errors are of such magnitude as to vitiate appellants' convictions and, accordingly, as asserted by appellants, reduced their trial to a mere formality.

## THE FACTS

On May 14, 1976, appellant, Truman Bolden, was arrested after an alleged altercation with Officer Jimmy Carter of the Forrest City Police Department. Later that day,

a warrant was issued for the arrest of appellant, Dozier Bolden, for his alleged participation in the altercation.

On June 23, 1976, the Prosecuting Attorney for the First Judicial Circuit, of which St. Francis County is a part, filed informations charging appellant, Truman Bolden, with first degree battery and charging Dozier Bolden as an accomplice.

Appellants were formally arraigned in the Circuit Court of St. Francis County on July 26, 1976, where pleas of not guilty to the charges were entered.

On October 11, 1976, appellants filed their motion to suppress the informations alleging that appellants had not been afforded a preliminary hearing to the end that it be determined if probable cause existed and that such failure dictated a dismissal of the informations.

On October 22, 1976, a pretrial conference was conducted by the Honorable O. H. Hargraves. During the pretrial conference, an exchange between Judge Hargraves and counsel for appellants culminated in counsel orally moving "that Judge Olman Hargraves be removed from the case because of bias." Judge Hargraves replied, "I will be glad to excuse myself from it."

Judge Hargraves, however, proceeded with the selection and instruction of a new jury commission for the selection of special jurors for the trial of this cause only in accordance with Ark. Stat. § 39-214.1 which was necessitated because of Judge Hargraves having previously sustained appellants' motion to quash the current jury commission and the petit jury panel; the judge also reaffirmed that the trial of the case would be held, as scheduled, on October 26, 1976, with Judge John Anderson presiding; the judge also conducted a hearing on appellants' motion to suppress the informations and, at the close of the hearing, denied the motion to suppress.



The Honorable John L. Anderson presided at appellants' trial which commenced on October 26, 1976, and ended October 29, 1976. The jury found appellant, Truman Bolden, guilty of battery in the first degree, as charged, and fixed his punishment at twenty years in the Department of Correction and imposed a fine in the sum of $1,000.00. Appellant, Dozier Bolden, was found guilty of battery in the second degree and his punishment was fixed at three years in the Department of Correction and a fine of $1,000.00 was assessed.

## APPELLANTS' CONTENTIONS FOR REVERSAL

1. It was prejudicial error to deny the appellants a preliminary hearing.

2. It was prejudicial error for Circuit Judge O. H. Hargraves to exercise discretionary powers after he had excused himself from appellants' case.

3. It was error for the trial court to refuse to direct a verdict.

4. It was prejudicial error to submit a verdict form under which it cannot be said the jury acted according to law.

## THE DECISION

### I.

We are persuaded that appellants' contentions two and four have merit, and, accordingly, the verdicts and judgment are reversed.

The record reflects that Circuit Judge Hargraves, in response to appellants' motion, voluntarily disqualified himself from participating in this case at the inception of the pretrial conference held on October 22, 1976. Having an-

nounced from the bench and for the record his disqualification, Judge Hargraves lost jurisdiction of the case and was without authority to act further in any judicial capacity, except to make the proper transfer of the case or take the appropriate steps for the selection of another judge. However, this record reflects that the transfer of the case was not made until after Judge Hargraves had selected a new jury commission, instructed the new jury commission on its duties and responsibilities and ruled on the validity of appellants' motion challenging the charges pending against them on the grounds that no preliminary hearing had been afforded appellants.

The judge's voluntary disqualification may have, in the judgment of appellants and their counsel, amounted to an admission of his bias and prejudice, and for the judge to proceed with issues, raised by defendants, involving the exercise of discretion, may have further supported their doubt or suspicion of the impartiality of his rulings. Indeed, the proper administration of the law requires not only that judges refrain from actual bias, but also that they avoid all appearances of unfairness.

Judge Hargraves, however, is to be commended for his voluntary action, whether he actually sheltered any bias or not, in order to dispel any thought or suspicion that the litigants may not be receiving an impartial trial.

In 48 C.J.S., Section 97, at page 1105, it is provided:

> "The disqualification of a judge generally deprives him of authority to perform any judicial act or to perform any act calling for an exercise of judicial discretion in connection with the pending cause, except to select another judge or to make a transfer of the case in accordance with the law."



## Joseph H. WESTON *v.* STATE of Arkansas

CR 75-49 528 S.W. 2d 412

Opinion delivered October 20, 1975

1. CONSTITUTIONAL LAW — FREEDOM OF THE PRESS — TRUTH AS A DEFENSE IN CRIMINAL LIBEL PROSECUTIONS. — Under the Arkansas Constitution, in all criminal prosecutions for libel, the truth is a defense even when the offending publication is not made with good motives and for justifiable ends. [Art. 2, § 6.]
2. CONSTITUTIONAL LAW — JUDICIAL POWERS — CONSTRUCTION OF STATUTES. — The Supreme Court must strive to uphold the constitutionality of a statute but it may not read words into a statute to save its constitutionality, and has no authority to legislate or to construe a statute to mean other than what it says, if the statute is plain and unambiguous.
3. CONSTITUTIONAL LAW — CRIMINAL LIBEL STATUTE, APPLICATION OF — JUDICIAL AUTHORITY. — The Supreme Court was without authority to limit the application of the criminal libel statute in order to meet requirements of the First and Fourteenth Amendments to the U.S. Constitution where the statute was plain and unambiguous, and clearly violative of the constitution.
4. LIBEL — CRIMINAL LIBEL — VALIDITY OF STATUTE. — The criminal libel statute *held* unconstitutional in that it fails to prohibit punishment for truthful criticism, and fails to prohibit punishment for false statements regarding public officials unless made with knowledge of their falsity or in reckless disregard of whether they are true or false.

Appeal from the Clay County Circuit Court, Western District, First Division.

*Cearley & Gitchel*, for appellant.

*Jim Guy Tucker*, Atty. Gen., by: *Gary Isbell*, Asst. Atty. Gen., for appellee.

LeRoy Autrey, Special Justice. Joseph H. Weston, the editor and publisher of the Sharp Citizen, a weekly newspaper of Cave City, has appealed his conviction in the Clay County Circuit Court of the crime of criminal libel as defined in Section 41-2401 *et. seq.*, *Arkansas Statutes*. The information under which Weston was convicted alleged that he had on November 30, 1973, published in the Sharp Citizen "a false, malicious and defamatory libel" which "tended to impeach the honesty, integrity, veracity and reputation of . . . Liddell Jones," the Sheriff of Clay County. The information charged and the undisputed evidence showed that the offending article in the Sharp Citizen was headlined as follows:

> "SHARP CITIZEN MAKES A MISTAKE IN REPORTING STORY OF CORNING AND DISCOVERS THAT NARCOTICS RACKET FLOURISHES IN CLAY COUNTY AND CORNING UNDER DIRECTION OF SHERIFF LIDDELL JONES, AN APPOINTEE OF GOVERNOR DALE BUMPERS."

The article below this headline included the following statement:

> "In the meantime, however, we also discovered that law enforcement in Clay County has dropped to a low level again under the direction of the present sheriff, Liddell Jones, appointee of Governor Dale Bumpers who took office following the passing away of Sheriff Pond. It was Sheriff Liddell Jones and his deputies who made the threats of violence to witnesses of the death of Street Shaw."

Mary D. Shaw, the widow of Street Shaw, deceased, testified that shortly after her husband had been shot and killed on October 11, 1973, Weston had come to her house for an interview to find out how her husband had been killed. Mrs. Shaw testified that she gave Weston the information



which is set forth in the above set out newspaper headline and article. She said that she told Weston that William Donald, who was in jail wher her husband was killed, told her that he could get dope from Sheriff Jones.

Sheriff Jones had served as Sheriff of Clay County for about 15 months, succeeding Sheriff Bill Pond who had been killed in an accident. He testified that he had made the complaint against Weston; that the offending headline and the story appearing in the Sharp Citizen were false; that since he had been sheriff he had made arrests and pursued prosecutions in 20 to 30 drug and narcotics violations; and that he had been subjected to some degree of ridicule, scorn and public hatred from the offending headline and article in the Sharp Citizen.

The trial court jury instructions included the usual instructions in criminal prosecutions and the following:

### COURT'S INSTRUCTION NO. 3

> "It is unlawful, a crime, and a felony for any person to maliciously defame, either by writing, printing, or by signs or pictures or the like tending to blacken the memory of one who is dead, or impeach the honesty, integrity, veracity, virtue or reputation or to publish the natural defects of one who is living and thereby expose him to hatred, contempt and ridicule as set out in Section 41-2401 of the *Arkansas Statutes*."

### COURT'S INSTRUCTION NO. 5

> "In all prosecutions for libel the truth may be given in evidence in justification thereof."

The Court refused the below set out instructions requested by the appellant:

## REQUESTED INSTRUCTION NO. 1

"You are instructed that there are situations in which the law protects the author of a defamatory statement from prosecution for Criminal Libel. Where this protection is afforded a privilege is said to exist and even though the statement made be untrue, the author may not be subjected to criminal prosecution unless the statement was published with actual knowledge of its falsity or with reckless disregard of whether it was false or not. One area in which such a privilege exists is the area of comment upon matters of public concern or criticism of the official conduct of public officials.

"The Constitutional guaranty of freedom of speech and of the press, contained in the First Amendment, prohibits the imposing of criminal sanctions for truthful criticism of public officials, and criminal liability may be imposed for false defamatory criticism of the official conduct of a public official only if the statement is made with express malice, which is defined as actual knowledge that the statement is false, or a reckless disregard as to whether or not it is true or false."

## REQUESTED INSTRUCTION NO. 2

"When we speak of express malice in criminal libel case the term has a very distinct meaning apart from its ordinary use. A statement made with express malice is one made with actual knowledge that it is false or with reckless disregard of whether it is false or not. Therefore, even if you find that the statement was false and was made out of hatred you must acquit the defendant unless you also find beyond a reasonable doubt that the defendant either knew the statement to be false or published it with a reckless disregard of whether it was false or not. To find the statement was vehement, caustic, or unpleasantly sharp is not enough."



The jury's verdict found the appellant guilty and fixed his punishment "at a fine of $4,000.00 and/or imprisonment in the penitentiary for a period of three months." The judgment of the Court provided that the appellant should "be fined, in accordance with the verdict returned by the jury, $4,000.00, and that he be imprisoned in the state penitentiary for a period of three months."

The appellant contends that his conviction should be dismissed on the grounds that *Arkansas Statutes,* Section 41-2401 *et. seq.*[1], is violative of the rights guaranteed under the First and Fourteenth Amendments to the Constitution of the United States in that the statute (a) does not require that a statement alleged to be libelous be false, (b) does not require that the allegedly libelous statement be made with actual malice when the statement refers to a public official or a matter of public concern, and (c) is so vague, general and indefinite in its terms that it fails to apprise one of the conduct proscribed. Appellant also contends that the Trial Court erred in refusing the appellant's requested instructions 1 and 2 above set out and that the Trial Court erred in entering judgment and pronouncing sentence on the jury's verdict.

The appellee contends (a) that the appellant's requested instructions 1 and 2 correctly states the constitutional limitation on a prosecution for criminal libel; (b) that the Trial Court's refusal to give instructions requested by the appellant resulted in the statute being unconstitutionally applied to the appellant; and (c) that this case should be reversed and remanded for a retrial. The appellee contends that "a judicial restriction of the statutory scheme in compliance with the

[1] *Arkansas Statutes,* "Section 41-2401 *Libel Defined.* A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, veracity, virtue, or reputation, or to publish the natural defects, of one who is living, and thereby expose him to public

holdings of the United States Supreme Court will avoid the necessity of striking the statute in question as unconstitutional, and then the statute will have only been unconstitutionally applied to the appellant."

Appellant's requested instructions 1 and 2 above set out follow the rule established by the U. S. Supreme Court in *Garrison* v. *Louisiana*, 379 U.S. 64, 78; 85 S. Ct. 209, 217 (1964). There the Court held that the Louisiana defamation statute was invalid under the First and Fourteenth Amendments to the Constitution of the United States. In so holding the Court applied the rule laid down in a civil libel case brought by a public official, *New York Times* v. *Sullivan*,

hatred, contempt and ridicule.

"Section 41-2402 *Penalty for Libel*. Every person, whether writer, printer or publisher, convicted of the crime of libel, shall be fined in any sum not exceeding five thousand dollars ($5,000.00) and may also be imprisoned, not exceeding one (1) year at the discretion of the jury who shall pass on the case; and when any such case shall be decided without the intervention of a jury, then at the discretion of the Court.

"Section 41-2403 *Truth as justification for libel*. In all prosecutions for libel under the provisions of the preceding sections, the truth thereof may be given in evidence in justification."

376 U.S. 254, 84 S. Ct. 710 (1964). In *Garrison*, the U.S. Supreme Court held that the Louisiana defamation statute was unconstitutional because it directed punishment for true statements made with "actual malice," contrary to the rule laid down in *New York Times*, and in addition:

> "The statute is also unconstitutional as interpreted to cover false statements against public officials. The New York Times standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth."



Like the Louisiana defamation statute in *Garrison, Arkansas Statutes*, Section 41-2401 *et. seq.*, fails to prohibit punishment for truthful criticism. Section 41-2403, *Arkansas Statutes*, provides that truth "may be given in evidence in justification," but this falls short of the *New York Times* rule which "absolutely prohibits punishment for truthful criticism." *Garrison* v. *Louisiana*, 379 U.S. 64, 78; 85 S. Ct. 209, 217. Under the rule laid down in *Garrison*, truth is a defense even when the offending publication is not made "with good motives and for justifiable ends" as provided in Article 2, Section 6, of the Arkansas Constitution.[2]

Also, like the Louisiana defamation statute in *Garrison*, the Arkansas criminal libel statute fails to prohibit punishment for false statements regarding public officials, "unless made with knowledge of their falsity or in reckless disregard of whether they are true or false." Nowhere in the Arkansas criminal libel statute is there any exception for criticism of a public official.

[2]Article 2, Section 6, of the Arkansas Constitution provides:

"The liberty of the press shall forever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such rights. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party charged shall be acquitted."

The appellee argues that this Court may limit the application of the Arkansas libel statute so that it meets the requirements of the First and Fourteenth Amendments to the U.S. Constitution as laid down by the U.S. Supreme Court in

*New York Times* and *Garrison*, but this Court must reject the appellee's argument. While this Court must strive to uphold the constitutionality of a statute, it may not read words into a statute to save its constitutionality. This rule was well expressed in *Board of Commissioners of Red River Bridge District* v. *Wood et al*, 183 Ark. 1082, 40 S.W. 2d 435, 438 (1931) as follows:

> "The rule requiring courts to uphold the statute, if there is any doubt as to whether the power of the Legislature exists under the Constitution, does not authorize the court to read words into the statute even to save its constitutionality. If the statute does not violate the Constitution, or if there is any doubt about whether it does or not, it is the duty of the court to uphold the statute, but, if there is no doubt about the statute being in conflict with the Constitution, then it is the duty of the court to uphold the Constitution and declare the act void, and it is only in cases where the language of the act will bear two constructions that the court is justified in adopting a construction that will sustain rather than one which will defeat it."

Clearly this Court has no authority to legislate or to construe a statute to mean anything other than what it says, if the statute is plain and unambiguous. *Burrell* v. *State*, 203 Ark. 1124, 160 S.W. 2d 218 (1942); *Johnson* v. *Lowman*, 193 Ark. 8, 97 S.W. 2d 86 (1936). The language of the statute here involved is clear and unambiguous, and this Court has no authority to amend the statute to conform to the rules laid down by the U.S. Supreme Court in *New York Times* and *Garrison*.

In *Commonwealth* v. *Armao*, 286 A. 2d 626, 632 (1972) the Supreme Court of Pennsylvania held that the Commonwealth's criminal libel statute was unconstitutional because (1) the statutory language made no provision for truth being an absolute defense and (2) no recognition was



given in the statute to the reckless disregard and knowing falsity standards mandated by the U.S. Supreme Court in *New York Times* and *Garrison*. In rejecting the argument of the Commonwealth that the Court should construe this criminal libel statute to make it meet the requirements of the First and Fourteenth Amendments to the U.S. Constitution, the Court there stated:

> "The Commonwealth urges us to in effect re-draft the criminal libel statutes in accordance with First Amendment requirements. To accede to this request would be to undertake a wholly inappropriate judicial activity amounting to judicial legislation. See *State Board of Chiropractic Examiner* v. *Life Fellowship of Pennsylvania*, 441 Pa. 293, 300, 272 A. 2d 478, 482 (1971); *Saulsbury* v. *Bethlehem Steel Co.*, 413 Pa. 316, 320, 196 A. 2d 664, 667 (1964). Nor can we perceive any possible means of merely severing out the invalid portions of the statutes, for not only must the legislative body have intended the statute or section to be separable, but also the act must be capable of separation in fact. See *Saulsbury* v. *Bethlehem Steel Co.*, *supra*, at 320-321, 196 A. 2d at 666-667."

The above set out jury instructions numbered 3 and 5 given by the Trial Court correctly stated the statutory law, but the Arkansas criminal libel statute is unconstitutional under the rulings of the U.S. Supreme Court in *New York Times* v. *Sullivan*, *supra*, and *Garrison* v. *Louisiana*, *supra*.

Reversed and dismissed.

FOGLEMAN, J., not participating.